THE GRAND JURY SYSTEM

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PREFACE.

The criminal side of the law has its attractions to a very large number of people. It is a phase of law which directly affects personal rights and personal liberties, and therefore touches a sentiment dear to the Anglo-Saxon people. Their whole political history has been surcharged with a struggle for freedom from arbitrary government. Among the many institutions that have developed during the course of this endeavor is to be found the grand jury. It is one of the institutions which has been developed to perpetuate popular participation in the administration of justice. The aim has been to secure a greater amount of popular sovereignty in the administration of criminal law, just as along other lines, this onward progress has been characterized by a greater and greater participation of the people in the affairs of government.

In the actual admininstration of the criminal law the grand jury demands the study of the legal profession, the judges and the lawyers. They are the men that are called upon to run this bit of legal machinery and therefore they should know its technique. But, as with many other technical men, they are apt to consider the system too much as an isolated fact. They are concerned with it primarily to get work out of it and only remotely interested in its relation to social welfare.

As an instrument of government the institution has a peculiar interest to the political scientist. He is interested

in its origin and development because of the inherent interest and fascination of such study, and because of the explanation that a historical study gives of the long-continued and peculiar use of the system. He is interested in the legal questions involved in its administration that he may more fully understand its actual workings in practice. But more particularly is he interested in the question as to the place that the grand jury occupies in the actual administration of justice. In view of these postulates an attempt will be made in the course of the thesis briefly to trace the essential steps in the development of the institution, to consider some of its most fundamental legal relations, and then to analyze its legitimate use in the administartion of criminal justice at the present time.

It seems somewhat strange that but few systematic treatises deal with the grand jury and even these have their limitations. Forsyth's "History of Trial by Juries" gives a brief account of its history but is based almost entirely on secondary works that appeared before the middle of the nineteenth century, for the book was published in 1852. It is often misleading. Thompson and Merriam's book on "Juries" is not up-to-date(1882) and consists principally of a digest. The latest work is Edwards' "Grand Jury". This is a lifeless and formal treatise also, in the main, a

digest. It is not a scholarly work and is not even a safe guide for a practioner. His conclusions are based very largely on the Pennsylvania practice, which is hardly typical of the entire country. He might be styled a "reactionary". In addition to these shortcomings he fails to make a proper interpretation of several cases and thus adds to the confusion. But, while these works are inadequate I must acknowledge a great deal of help from them. They have served as valuable guides and in many cases have directed me to important references.

I regret that time did not permit me to make a fuller study of the most neglected field of all, a study of its actual workings. In place of such a full discussion I have simply summarized the impressions that I have gained during the course of this study. They are not intended to be final, but are given simply to indicate some of the questions involved in such a study.

----WILLIAM BETHKE----

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CHAPTER I.

THE ORIGIN AND DEVELOPMENT OF THE GRAND JURY.

The beginnings of few institutions are enveloped in such obscurity as those of the grand jury. The one thing certain about it is that it is not an institution which owes its existence to some preconceived theory of jurisprudence. It was not born full-fledged, a creature of special creation, with all the attributes of the present system. It is to-day known as an evolutionary product with centuries of development. As such it is subject to the problems inherent in the evolutionary theory. There are some mysteries, some gaps, incapable of explanation with our present fund of knowledge. Some things must be assumed and their final explanation must be entrusted to the workings of time. But while these limitations exist, sufficient knowledge has been acquired to enable historians with a trained judgment to indicate the essential steps in the development of the system.

A word of precaution should be thrown out at the very beginning concerning the historical works on this subject. Many of the historians are after all quite provincial. They write either to glorify or to defame the history of a particular country or period. A great deal that is written about the history of the grand jury is too much concerned in prov-

ing its origin on English soil. The fact that the grand jury as it is known to-day is distinctly English does not necessarily imply that it owes its ultimate origin to English ancestors. Much that is considered peculiarly English has merely been systematized by the English and contains elements that work in a very different manner in other countries. Therefore,if the historian finds that certain practices on the continent contained elements similar to those which entered into the growth of the grand jury,and that these were or might have been transmitted to English law, such evidence should not be rejected simply because of a blind feeling of national pride,but should receive the fullest consideration. On the other hand,great care should be exercised so as not to confuse partial resemblances with complete identities. An effort has been made to avoid these two extremes in the course of this discussion.

The earliest record that we have in English history of something that looks very much like our modern grand jury is a statute of Ethelred II.of the year 997. It provided that "a gemot be held in each wapentake,and the twelve senior thegns go out and the reeve with them,and swear on the relic that is given them in hand that they will accuse no innocent man nor conceal any guilty one"[1] This is regarded by many critics as the earliest legal provision for a jury of presentment. It seems,further,to be generally agreed that

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1.Taylor-----English Constitution,1:204.

this act did not create the jury,but was merely declaratory of a practice long familiar to a large number of the people.[1] It was but an introduction of the representative principle into the Teutonic practice of courts in the assemblies of freemen.

While this record of nearly a thousand years ago exists, great diversity of opinion prevails as to just how much significance should be attached to it. The difficulty arises out of the fact that no records have been discovered during the succeeding two hundred years that give any indication as to what use was made of this law. Historians have professed their inability to pierce the darkness which surrounds this period.[2] The inquisition was used in civil matters,but there is no record as to the extent of its use in criminal affairs. The period was one of change and adjustment. The Norman conquest disturbed the old order,introduced some new practices, and deflected many local tendencies so as to adjust them to its own usage.

It seems quite likely,however,that the principle of the grand jury was well received by the invaders. The accusing jury was an element in the procedure of the Frankish courts under the Carolingian kings and produced in Normandy under the Norman Dukes. The inquisition,likewise,seems to have been a well-known institution in Normandy before the conquest.[3] Under these circumstances it seems quite likely that both

1.See Edwards-----Grand Jury,p.5.
2.White-----Making of the English Constitution,p.147.
3.Maitland-----Constitutional History of England,p.126.
Thayer-----Harvard Law Review,5:255.

forces,the familiar practices of the Anglo-Saxons in England and the experiences of the new governors,united in working out the final system of the grand jury.

Whatever influences these early institutions analogous to our modern grand jury may have had on its final development,was supplemented by certain practices of this period which contain elements that may be found in the grand jury. The frank-pledge contained the germs of what could easily be transformed into the grand jury without doing great violence to the principle of [illegible]ation in social institutions. It is not such a great step from the responsibility of producing an offender to the responsibility of telling on him. The legal obligation could be changed without effecting much of a jar. Then,Again,in the numerous inquests of the Norman period machinery was used that is very similar to the jury of presentment. The use of twelve sworn knights for the purpose of supplying information to the king in land disputes and other civil matters was easily capable of further application. As a matter of fact,it seems that the final establishment of the presentment in criminal cases grew out of the use of the inquest in these civil matters. The jury of presentment was an offshoot of the royal fiscal inquisition. That the practice which worked so effectively in protecting the financial interests of the crown could incidentally be used in discovering and suppressing crime is not such a far-fetched corollary but that an acute and sagacious administrator could

discover the use especially in view of the probable precedents in both the English and the Norman courts for such a use of the inquisitors.

Such an idea seems to have been in the mind of Henry II. when he issued the Assize of Clarendon in 1166. This act finally established in English law the grand jury for the presentment of criminals. From this time on its development can be traced with some degree of certainty,for it remains within the field of historical record. But even a superficial study of this document at once impresses one with the fact that it was not primarily a code of criminal procedure in which the jury of presentment was established as the means by which criminals were to be indicted and presented to the crown for trial;[1] the more effectual enforcement of the royal revenue laws was the chief object in the mind of the great law-giver. The jurors are to swear as to "what profits have fallen to the crown,as to escheats,forfeitures,marriages,wardships,widows,Jews,treasure trove and other sources of income;as to misdoings of the sheriff and his bailiffs;also as to whether there are at that time in their localities murderers,robbers,thieves,or the receivers of them".[2] The last provision in addition to suppressing lawlessness and establishing security,likewise,brought in considerable sums of money in the form of fines. Thus it is evident that the early grand jury--and the term is

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1.The idea conveyed by Forsyth-----History of Juries.
2.Maitland-----Constitutional History of England,p.126.

used to distinguish the nature of the body rather than its etymological meaning,for in its earlier sense the term grand jury simply distinguished the body summoned from the entire county from the body summoned from the hundred---was burdened with a multitude of duties among which that of ferreting out crime was one of the least important. Clearly then the Assize of Clarendon does not stand primarily for the establishment of the modern grand jury. It merely gave it an epoch-making start by introducing some permanent practice into the irregular and somewhat unorganized use of the inquisition preceding this time. The jury of presentment did now,however,rapidly become a permanent fixture in criminal trials. It remained for the succeeding centuries to work out its final organization and powers.

The jury established by that famous document consisted of twelve men from the hundred and four men from each township. It was very much a local body. It seems that though the statute prescribed a number of men to constitute the body,this number was not always adhered to in practice. Mr. Thayer[1] cites several cases as late as 1219 in which the number varied between nine and forty members. That would seem to indicate that the above prescribed number was not mandatory but simply directory. It is but another indication of the growth involved in its final establishment.

1.Thayer-----Harvard Law Review,5:295.

It is not until the time of Edward III.,in the year 1368,that a record is found which shows a change in the organization of the body. That year at the regular session of oyer and terminer at Chelmsford,the justices called upon the bailiffs of each hundred to return their panels. Then it seems that the sheriff returned a panel of twenty-four knights from the entire county which was the grand inquest (le grand enquest).[1] The work of this body seems to have been to inquire at large for all the hundreds. The need for such a body undoubtedly existed and therefore it was destined to become permanent. There are no indications as to the authority under which this was done,but it seems to have originated at that session either through the initiative of the justices,or the sheriff, or the two working together. It was authorized by no statute and apparently had no existence in prior custom.[2]

The practice of holding the grand inquest grew rapidly,while that of the hundred declined. The former simplified the administration of justice and in fact was a necessary accompaniment of the county courts;it made the territorial jurisdiction co-extensive. The single body was less unwieldy than the several bodies which it supplanted. The hundredors seems to have consented to change without protest,probably because it relieved them of considerable responsibility without effecting any substantial loss in local self-government. The courts,of course,favored the

1.Reeve's History of English Law,III,p.133.
Forsyth-----History of Trial by Juries,p.218.
2.Forsyth-----History of Trial by Juries,p.218-219.
King v.Fitch,Cro.Chas.414 gives indications of this conclusion.

system. This larger body,less hampered by personal relationships,proved,in some respects,a more effective instrument in aid of justice than the former smaller body had been. All things worked for the maintenance of the new system.

The centralization and more effective administration of justice tended to make the grand inquest more and more a part of the judicial practice of the realm,while the better organization of the purely administrative and executive work of regular appointed and permanent officials tended to decrease the administrative work of these local bodies. In this change consists the distinctly English development of the inquest. On the continent this latter development never advanced beyond its rudimentary stage, and as the need for administrative work ceased,the institution itself gradually died off.[1] During this same time it began its peculiar and astonishing development in England. When this transformation is distinctly borne in mind it is substantially correct to say that the grand jury is an English product.

In point of time the grand jury had practically completed its period of formation by the middle of the fourteenth century. It but remained to gradually prefer twenty-three instead of twenty-four. The concurrence of twelve has always been recognized as sufficient to render

1.See Thayer,-----Harvard Law Review,5:251.

a decision. This then constitutes the common law grand jury,-- a body of from twelve to twenty-three men,and the agreement of at least twelve for legal action. Thus, if the question of what ultimate elements have entered into the making of the grand jury be laid aside,and if the disputes of judicial antiquarians as to whether its origin may be traced to Saxon or Norman practices,or even Roman times,it will be found that the body in its true form and nature is of comparatively recent origin.

But while the form of the grand jury was established in the fourteenth century,the body was not yet in effect the modern grand jury. Its purposes and powers had to undergo some interesting developments. It has been pointed out that at its inception into English law it was a powerful arm of the crown in aid of local administration. It aided the government in its fiscal administration,in maintaining the diligence and honesty of the sheriff and his bailiffs,and finally in discovering all crimes and those who through crime or treason showed any disloyalty to the sovereign government. This characteristic of the grand jury as being an aid for a rather arbitrary government was to undergo radical changes. It was to reverse its character as a strong instrument of the crown to a mighty independent power which stood steadfast between the crown and the people in the defense of human liberty.

The seed of this independence had been sown in the middle of the thirteenth century, in the reign of Henry III. In the oath required of the grand jurors of that time they are "to conceal those things which they have heard."[1] This is the first reference to an oath of secrecy. It did not stand for the secrecy which we now know. The purpose of the secrecy seems to have been to keep the proceedings of a grand jury away from suspected persons in order that these might not effect an escape. This was not such a secrecy as exempts the grand jurors from responsibility. The justices and judges would still inquire of them as individuals or as a body the grounds upom which they based their conclusions. These same persons could still sit on the trial jury and thus act as witnesses against the accused. This privilege was not denied by statute until the year 1352,[2] but it seems quite certain that it had fallen into general disuse by this time.[3]

Quite soon after the establishment of the grand inquest it became necessary to adopt some other means of getting the necessary information than by depending upon the personal knowledge of the jurors. The grand jurors summoned from the entire county could not always possess the first-hand information that was required to find an indictment. Local witnesses were required to furnish

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1. White-----Making of the English Constitution, p.149.
2. " ----- " " " " " ,p.149.
3. Edwards-----Grand Jury, pp.21-23.

this necessary amount of evidence. As the practice grew of depending largely upon the sworn statements of witnesses for the facts upon which to find bills, the responsibility of the jurors grew less. The practice seems to have almost fallen into disuse of questioning the jurors themselves. They enjoyed almost complete secrecy in their actions, and this immunity came to be looked upon as a right.[1] They maintained that they were bound by an oath of secrecy which contained no reservation in favor of the government. This mantle of secrecy thrown about a body composed of some of the best men of the county, formed the basis of a powerful, independent, local government organization.

This independent, almost irresponsible, character of the grand jury made it a strong bulwark of the people against royal oppression and tyranny. It was a powerfully effective instrument in the hands of the Whigs during their struggle with Charles II. Many of the government's bills filed against these Whig leaders were returned ignoramous, often, no doubt, when legal justice should have required otherwise. This fact was attributed by the court party to the Whig influence. Mr. Attorney-General Sawyer raked up an almost forgotten statute of Henry VIII., under which the judges had the power to reform the panels of the grand jury. This was invoked, but

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I. Edwards--Grand Jury, P:20.

yet popular sympathy was so tender with the accused and distrust of the royal power so great that many of these bodies still stood out for independence and refused to indict. The government in trying to enforce its wishes resorted to all the older powers. Examples are on record of jurors being fined for refusing to indict, of being compelled to hear the evidence in open court, and of the prosecuting officer of the crown remaining in the room during deliberations to overawe and bully the members.[1]

These questions were finally decided in favor of the grand jury, not by a judicial decision of a high tribunal, but by the irresistible pressure of public opinion in two remarkable test cases which came up in 1681 in the city of London. The first was a bill of indictment for high treason filed against Stephen College, the Protestant joiner. The grand jury ignored the bill. Upon being asked by the Lord Chief Justice whether they would give a reason for their decision they simply replied that their verdict was a sufficient reason.[2]

In the same year an attempt was made to indict the Earl of Shaftesbury for high treason. Here a desperate effort was made to subject the jury to royal control. It marked a critical stage in the history of the institution. This jury was compelled to receive the evidence in

1. For this subject, see John Kinghorn---Law Magazine and Review, 367-82.
2. Howard-----State Trials, 8:549.

open court,thus destroying much of the secrecy and the freedom of action. The jury made a vigorous protest but without avail. The effort on the part of the court proved fruitless;the bill against the Earl was returned ignoramous. The verdict was accepted by the people with an acclaim of joy. Their great leader had escaped the snares that were laid for the taking of his life. They were outraged at the attempt and on the verge of revolution. In such a state of excitement the court found it expedient not to press its legal claims farther. Henceforth the grand jury was hailed as the defender of the people's liberty.[1]

It is this character of the grand jury that has been most deeply ingrained into the minds and consciousness of the English speaking people. They love the institution because of the part that it has played in some of the most stirring events connected with their struggle for freedom. From an arm of the government,which had a general superintendence over most of the details of the local administration,it now became the protector of the people against unfounded accusation and tried by an oppressive government. Only after arbitrary government had been succeeded by government of law by the people,could the public mind again assume a more normal and critical attitude toward this fond institution. The conception of

1.Howard-----State Trials,8:759.
Hallam-----Constitutional History of England,2:202-3.

the grand jury as a great bulwark of liberty was still at its height at the time when the constitution of the United States was adopted;hence,its inclusion in the first ten amendments.[1]

A few words should be said as to the qualifications of the grand jurors. These were not mentioned in the early documents in particular,but usually consisted of the knights. At the time of Bracton the qualifications were stated as follows: "They shall choose twelve knights,or free and legal men if knights cannot be found, who have no suit against anyone and are not sued themselves,nor have any evil fame for breaking the pease,or for the death of a man or other misdeed".[2] Furthermore, they had to be of the hundred in which they were chosen. In the sixteenth century he had to be a"freeman and a lawful liege subject,and,consequently neither under attainder of any treason or felony,nor a villain,nor alien, nor outlaw ----- all of whom were to be of the same county".[3] Blackstone simply stated that "they are usually gentlemen of the best figure in the county".[4] To-day,especially in the rural sections of England,it is quite common to include the local magistrates on the panel. They make valuable members through the information which

1.Article V.
2.Edwards------Grand Jury,p.60.
3.Ibid,p.60.
4.Commentaries,Vol.4,p.302.

they possess,and through this service acquire a great deal of schooling that aids them in the performance of their duties. They hear the criminal law expounded by the court and are required to consider questions arising under it.[1] The aim of all these provisions has been to secure the best possible men of the county for this service;it has been to enlist that better element of fine,public spirited men for which English local political life is famous.

No exact date can be given for the falling off of the local administrative duties. There was probably a gradual decline of these functions. By the time of Britton (latter part of the thirteenth century) the inquest corresponded in general with the work of the modern grand jury. He describes their work,in addition to ferreting out crime,"to present those whose duty it is to keep in repair bridges,causeways,and highways,for neglect of duty;and to inquire into the defects of jails and the nature thereof,who was to repair them,and who was responsible for any escapes which had occurred".[2] Thus the accusing jury quite rapidly specialized into an institution existing primarily for the purpose of presenting those suspected of crimes and only incidentally for the purpose of supervising a few local institutions.

1.Forsyth-----History of Trial by Juries,p.218.
2.Edwards-----Grand Jury,p.25.

This brief survey traces the grand jury in its development to the present common law organization. It suggests the many elements that probably entered into its final make-up. It indicates the change in the character of its functions form those primarily administrative to those primarily judicial. Then it points out its growth territorially; it covered at first merely the hundred but by the middle of the fourteenth century it began to extend over the entire county. Together with this latter change came a slight change in the composition of the body so that the common law grand jury was developed.

In this very brief discussion of the subject a great deal of interesting historical material has been omitted. The object has been to indicate, rather than prove, those essential steps in its development which explain its wide-spread and long-continued use. Some of the historical questions can better be represented in connection with the discussion of particular problems. Enough has been presented to show that this institution has played a significant part in the history of English speaking people, and has become deeply embalmed within their hearts. Nearly ten centuries of use has given it an enviable respectability, but its antiquity does not preclude the right of giving it a searching examination.

The succeeding chapters will consider more minutely the legal and administrative questions involved in its use.

CHAPTER II.

THE DEVELOPMENT OF THE GRAND JURY IN THE UNITED STATES.

The grand jury,as the preivious chapter indicates, is not an American production or contribution to judicial procedure. It is an inheritance which the young Republic has received from its mother country. When the early English settlers arrived on American soil,they found a great land without civil or criminal law,a lawless country,because,for all practical purposes,it was a world without a society. Yet these colonists were not planted in a philosophical state of nature where they might live in a state of blissful liberty,free from all traditional restraint and left to set up their own governmental institutions. They arrived at a time when law, at least outside of philosophical circles,was considered strictly personal. In a legal sense they simply came out on the frontiers of England,and took with them all the essential principles of the common law which were adaptable to local conditions. The grand jury system inhered in this system of law and this sprang into use naturally as occasion demanded.

The available records of the colonial history of English speaking America,however,tell us very little a-

bout the use of the institution during those early years. One may safely infer, from the dim reflections that have come down to us in regard to the trial of cases, that the early practices were not invariably perfectly regular. The judiciary did not always exist fully organized from the beginning. Justice was handed out in some crude way by the community. There are cases on record in which judicial questions were determined by the assembled citizens, or were made political issues and settled in the legislative assemblies, as is instanced by the "stray pig incident" in Massachusetts.[1] In view of these circumstances and in view of the fact that these same colonists were familiar with the use of the information and the complaint to bring people to trial, it seems likely that the grand jury practice was quite irregular. Just to what extent it was used, one cannot tell from any of the secondary works treating of the colonial era. No special study seems to have been made of it. Mr. Fiske incidentally adverts to several cases of the use of grand and petit juries in his "Beginnings of New England" and "The Dutch and Quaker Colonies", but neither of these works pretends to present a study of this particular problem.

But, while evidence of the use and working of the

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1. Fiske-----Beginnings of New England, pp. 106-108.

system is meagre,it may be ascertained to what extent this institution was recognized in constitutional documents. Strange to say,even there it is rarely mentioned. In answer to this it may be replied,with considerable justice,that few of these early documents contain anything in the nature of a bill of rights,and, therefore,naturally would not refer to the grand jury. On the other hand,many of the early documents did provide for a trial jury and other guarantees of English liberty,but remained conspicuously silent in regard to the accusing jury.

The earliest mention of the grand jury in charter documents of the colonial period is found in the Fundamental Constitutions of the Carolinas of the year, 1669. These provide that "grand jurors shall deliver upon their oath to the itinerant justices all cases that have come to their knowledge" The only other colony that had this method of bringing the suspected to trial,embodied in its fundamental law,was Pennsylvania; and even there it seems to have been guaranteed only for capital offenses. These at the time,of course,embraced a great number of crimes. In his "Frame of Government" of 1683,William Penn included these words: "All trials shall be by twelve men;-----in cases of life there shall be first twenty-four returned by the sher-

iffs,for a grand inquest,of whom twelve at least shall find the complaint to be true,and then the twelve men likewise returned by the sheriff,shall hear the final judgment." And that is all that colonial charters have to tell about this institution. The truth of the matter is that most of these early settlers came primarily for religious and economic reasons and only secondarily for political freedom. As certain as effect follows cause,so the fundamental laws of these people were more directly concerned with trading relations than with fine points of public law. The battles for civil liberty and for freedom from arbitrary trial and imprisonment had largely been won before their migration. Such principles were embodied in the law of the land and consequently required little consideration in constitutional documents.

It seems rather strange that immediately after the Declaration of Independence likewise two[1] out of the thirteen colonies of the American states made any mention of the grand jury. Of these only one[2] guaranteed it as a constitutional right,while the other[3] merely implies its existence in the following section:

1.North Carolina--1776; Georgia--1777.
2.North Carolina.
3.Georgia.

"No grand jury shall consist of less than eighteen,and twelve may find a bill."[1] This modification of the common law jury does not aid personal liberty and freedom from trial,but rather aids the government in finding indictments against persons,for the larger the quorum the easier it is to find twelve men that will return a true bill. This reference to the grand jury was omitted from the constitution of that state in 1792,and no reference to the body has appeared in the succeeding constitutions to the present time.

Out of the thirteen original states five[2] to this day have not grafted the grand jury system into their constitutions. The others placed it there in the following order:North Carolina,1776;Pennsylvania,1790; Delaware,1792;Connecticut,1818;New York,1821;Rhode Island,1842;New Jersey,1844;and South Carolina,1868.All, however,use the system in their criminal procedure, and,with the single exception of Connecticut,require it for the prosecution of all criminal cases except police cases or misdemeanors. Connecticut requires it only for capital crimes and those punishable by imprisonment for life.

This development indicates that in our early history it was not considered to be necessary to rivet the

1.The Constitution of Georgia,1777.
2.Georgia,Maryland,Massachusetts,New Hampshire,and Virginia.

grand jury system upon our courts by constitutional provisions. Through all this time,however,the petit jury was usually guaranteed in a section of the organic laws. A reasonable inference from this relationship seems to be that the latter was considered to be a much more fundamental guarantee of liberty than the former. Either through deliberate design or through a wanting sense of its importance,the grand jury in our early history received very little recognition in state constitutions.

The practice of including some provision in the constitution relative to the grand jury grew up side by side with the tendency to frame more detailed constitutions in general. This seems to be coupled with a growing lack of confidence in popular,representative,legislative bodies. The tendency for these same bodies to more and more modify common law procedure by statutory declarations likewise gave some impetus to the movement.

One of the greatest factors in this development was the precedent of such a provision in the bill of rights of the federal constituion. The history of the struggle for the bill of rights of that document had impressed the people unduly with the importance and

sanctity of such provisions. The tendency to slavishly copy these same sections into the succeeding state constitutions resulted in the inclusion of the grand jury into the people's fundamental laws. This did not follow immediately into all these documents because of the inherent difficulty of changing most American constitutions,but,as one state after another effected a revision of its old constitution or adopted an entirely new one,this provision usually crept in.

This bill of rights appended to the federal constitution perpetuates the grand jury system in the federal practice in these words:"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by a grand jury,except in cases arising in the land and naval forces,or in the militia,when in actual service,in time of war and public danger."[1] This provision requires the grand jury in the prosecutions by the federal government of all the more serious crimes,except military offenses in which more summary and convenient methods must be used to maintain discipline and order.

This provision has,however,required some judicial

1.Fifth Amendment.

interpretation,for it does not define "otherwise infamous crimes" In the early federal practice nearly all cases were tried on indictment and therefore no question could arise as to the meaning of the term. But the Civil War brought on a certain distrust in local bodies to indict for federal offenses of a political nature. This feeling of a questionable efficiency,led to prosecution upon information to a considerable degree,especially with reference to violations of the franchise laws. It then became necessary to prescribe some bounds to this power.

This was not such an easy task as one might assume, for legal terms like institutions evolve and grow from a rather indistinct and obscure origin. Little light is shed upon the question by the obscurity of the language itself as construed by the laws and usages of more than a century ago. There were at least two conceptions of "infamous crimes",one based upon the degree of punishment that might be inflicted for the offense, and the other based upon the competency of the convicted person to act as a witness in a subsequent proceeding. The Supreme Court therefore was called upon to decide which test should be applied,and,having done so,to prescribe the limits of the choice made.

The question was first submitted for judicial determination in the case of Ex Parte Wilson.[1] As to which definition should be accepted the court said:"The Fifth Amendment had in view the rule of the common law,governing the mode of prosecuting those accused of crime,by which an information by the Attorney-General,without the intervention of a grand jury,was not allowed for a capital crime,nor for any felony;rather than the rule of evidence by which those convicted of crimes of a certain character were disqualified to testify as witnesses. In other words,of the two kinds of infamy known to the law of England before the Declaration of Independence,the constitutional Amendment looked to the one founded on the opinions of the people respecting the mode of punishment, rather than to that founded on the construction of law respecting the future credibility of the delinquent." This conclusion seems perfectly logical when we consider that the leading word in the series,"capital",describes the crime by its punishment only;and accordingly,by an elementary rule of construction,"otherwise infamous crimes" must be held to include crimes subject to an infamous punishment,even if it should be held to include also crimes infamous in their nature,irrespective of the mode of punishment.

An infamous crime,then,is a crime for which an in -

1. 114 U.S.417.

famous punishment may be inflicted. It does not depend upon the ultimate punishment administered. If the accused is in danger of being subjected to an infamous punishment,if convicted,he has the right to insist that he shall not be put to trial except upon the presentment of a grand jury.

The question was not,however,finally disposed of in this decision. The court next had to define "infamous punishment". The difficulty here arises becausse the punishments that may be considered as infamous vary as public opinion changes from one age to another. In the above case the judges decided that imprisonment at hard labor in a state prison or penitentiary for a term of years should be considered as infamous punishment. This was sustained in United States vs.Petit.[1]

Soon after these decisions a case[2] presented itself in which a person,upon a proceeding by information,was sentenced to a term of years in a penitentiary without the appendage of the hard labor clause. Did this likewise constitute an infamous punishment? The court held that it did because the hard labor clause does not affect the essential nature of the punishment. Prison authorities often make little distinction in the handling of these cases and others. The determining factor is the term of sentence.

1.114 U.S.429.
2.Mackin vs.U.S.,117 U.S.348.

According to the decisions up to the present time, any crime for which a person,upon conviction,may receive a penitentiary sentence,is an infamous crime.This definition has been accepted for more than a quarter of a century and,has presented no difficulties. It clearly marks off the field for the use of the grand jury in the federal courts. But one can already see that it may again need revision. Criminology and penal science is seriously challenging many of the prevailing ideas and practices in regard to the treatment that should be accorded to society's erring members. If,under this influence,experience should recommend and practice accomplish a radical change in our present methods,it is quite conceivable that the boundary may have to be reestablished between the jurisdiction of information and indictment.

In returning to the development and present status of the grand jury in the several states,it may be said that this description cannot be made in general terms. The lack of uniformity in the laws of the forty-six different states,as we are familiar with it in the economic field,finds its counterpart in the laws relating to the grand jury. This should hardly be expected,especially,in view of the fact that the institution as such is not a spontaneous,erratic growth that has sprung up mushroom-like in each state;but that it came as a common inheri-

tance,ready-made,with centuries of traditions back of it. This lack of uniformity does not characterize the petit jury,which in the mind of Blackstone was so closely associated with the former that,in fact,it formed but its complement in the machinery for judicial trial. This institution is everywhere preserved practically,in its pure form. No attempt will be made at this point to give an explanation for this condition,but the suggestion may be thrown out that somehow this old characteristic institution of English criminal procedure does not snugly fit into the criminal procedure of modern America.

An outline of the present status of the grand jury in the different states must of necessity be rather sketchy and in the nature of a catalogue of characteristics. However,a clear understanding of the actual conditions may help in understanding some of the seemingly anomalous situations which must result from any attempt to understand the working of the system on the basis of a general description.

Out of the forty-six states in this union,thirty-one require the grand jury for one purpose or another. Twenty-seven out of this number require it to indict for all cases except certain minor offenses. Four require it merely for certain grave crimes such as capital punish-

ment[1], capital punishment and imprisonment for life[2], murder and treason[3], and capital punishment and crimes for which the penalty is greater than imprisonment for seven years[4]. In these thirty-one states the grand jury is required by constitutional provision in nineteen[5] and by legislative enactment in the remaining twelve[6]. In these latter states the constitutions either remain absolutely silent on this question or else they delegate complete control to the legislatures.

The provisions commonly found for the establishment of a grand jury are stated either positively or negatively. The positive provisions usually follow the wording of the federal constitution, "No person shall be held to answer for ---------- crime unless on a presentment or indictment of a grand jury." Five states[7] use a negative form of providing for the grand jury by requiring that "No person for any indictable offense shall be prosecuted against criminally by information." Two states[8] stand unique in that they have the

1. Louisiana.
2. Connecticut.
3. Indiana.
4. Vermont.
5. Alabama, Arkansas, Connecticut, Delaware, Florida, Iowa, Kentucky, Maine, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, West Virginia.
6. Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Mississippi, New Hampshire, Oklahoma, Vermont, Virginia.
7. Alabama, Delaware, Kentucky, Missouri, and Pennsylvania.
8. Wisconsin and Minnesota.

sufficiently general provision that "no person shall be held to answer a criminal offense without due process of law", thus permitting the government to define a "due process".

No state has, as yet, absolutely abolished the grand jury. The remaining fifteen[1] states permit either indictment or information for the prosecution of all offenses. If to this list be added the four states that require the indictment only in certain extreme cases, we have nineteen states in which the information plays a very important part in criminal trials. In a sense Minnesota may also be added to this list for a prisoner may be brought to trial on information in case he expresses a wish to plead guilty and the crime for which he is held is not punishable by more than seven years imprisonment in the state prison.[2]

Out of the fifteen states just mentioned, fourteen do not require a grand jury to be regularly summoned, while one[3] requires that it shall be summoned once a year. The method of summoning the body for special occasions in these states varies somewhat. The majority leave it to the direction of the judge as to whether a jury shall be summoned or not. A few states have reserved various devices by which the people directly or through some delegated official power may compell the

1. California, Colorado, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, North Dakota, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming.
2. Laws of 1905, ch. 231; amended, Laws of 1909, ch. 398.
3. California.

judge to summon such a body in case it seems desirable and his discretion does not so move him. The people, in other words, retain some control over this institution. In North Dakota[1] a grand jury may be summoned (1) at the discretion of the district judge, (2) at the request of the Board of County Commissioners of the county, and (3) at the request of 10% of the voters based upon the vote cast for governor within that county at the last preceding general election. In South Dakota[2] such a request may come from the prosecuting attorney, but the district judge need not heed such a wish unless he desires to do so. In this number of code states, therefore, offenses may usually be prosecuted either by indictment or by information. Indictments are practically done away with and most offenses are put to trial upon information. A grand jury may, however, still be summoned.

In determining the present legal status of the grand jury it becomes of some interest to notice the composition of the body in the different jurisdictions. The size varies greatly. In the federal system the body consists of twenty-three men, sixteen constituting a quorum, and the concurrence of twelve is required to find a true bill.[3] This jury is similar to the common law jury with the modification that a quorum is required greater than the number necessary to indict. This same body is used in twenty-

1. Revised Codes 1905---Section 9798.
2. Revised Codes 1903, pp. 1210-11.
3. U.S. Compiled Statutes 1901, section 808.

four states of the union.

Among the other twenty-two states the greatest variations are found. In no case has the size of the body been increased,but in many instances it has been greatly reduced. In twelve of these states the concurrence of twelve men is still required for an indictment but the size of the body and the quorum has been reduced. Usually these figures are respectively about fifteen and seventeen,or thirteen and fifteen. Kentucky has feduced these figures to the greatest extreme,having reduced the body to twelve men and thus requiring a unanimous verdict in order to indict. Indiana holds the distinction of having the smallest grand jury. Six constitute the body and five may indict. Three states[1] have a grand jury of seven members and require at least five to concur in any action. In another state[2] of this class the body consists of eight members, six constituting a quorum,and five may indict. Virginia has two classes of grand juries,regular and special;the former consists of nine to twelve,seven concurring;and the latter of six to nine,five concurring.

These figures seem to show a tendency to reduce the size of the grand jury in those states where it is little used. The original body was a large,representative body of the community. Its duties were more extensive than

1.-Mon., Ore., Utah.
2.-S.D..

merely to pass upon the sufficiency of the evidence collected by prosecuting authorities. Each member was to be a source of information as to the moral conditions in his immediate neighborhood,and act as its accuser in case of any violation of public order in the district. This phase of the grand jury work is becoming less and less important. As communities grow in size and in density of population it becomes increasingly difficult for a small body of men,summoned for a brief term of service,to act upon personal knowledge of conditions. Furthermore with the ever increasing efficiency of the police and the detective systems,the knowledge secured through those sources is much more detailed and comprehensive than can come through the casual information of an ordinary citizen. This knowledge is directly available at the prosecuting attorney's office. Under these conditions the grand jury ceases more and more to be a representative,accusing committee of the community,and tends to become a mere body of challengers that passes upon the sufficiency of the evidence presented before it. For this purpose a smaller body seems as well adapted as a large one. In responding to this demand,slowly to be sure,the grand jury simply presents another illustration of the truth that sooner or later the administrative and remedial proceedings must change with the advancement of legal science and the progress of society.

Two other reasons suggest themselves as causes for this reduction in number;these are the expense occasioned to the county and the inconvenience to the grand jurors themselves. The former item is especially significant in the newer and more sparsely settles regions. To pay a body of twenty-three men wages for several days' service is quite a drain on the finances of such a county. The mileage also is a considerable sum,especially,as is usually the case,if the counties are large. Then there are wages and mileage to pay to witnesses. The sheriff receives mileage and fees for summoning all the people. The sum of all this is considerable and the benefits probably not commensurate. Thus from a standpoint of pure economy the body should be reduced in size.

In Minnesota these sparsely settled counties are partly provided for in that in counties of less than 15,000 inhabitants no grand jury shall be summoned unless at least fifteen days before the term the judge shall file with the clerk an order directing the summoning of a grand jury;and in counties of less than 25,000 inhabitants a judge may order that no grand jury be summoned if it appears that there is no work for such a body. In all other counties a grand jury is required for each term of the court.[1]

1.Revised Laws 1905,Section 5262.

The problem of inconvenience to the persons called upon to render grand jury service is a rather grave and growing one. It is not confined to the sparsely settled regions; in fact, it seems to intensify in the more densely populated centers. As business becomes more active and competition keener it becomes even more difficult for the leading, active men of the community to give up their daily pursuits in order to render this public service. They would rather carry the division of labor to the extent of employing a few public officials to regularly look after this work. Furthermore, the amount of work required of a grand jury in a thickly populated city is something tremendous, for example the Federal grand jury for the Southern District of New York for the June term of 1909, was in existence for four months during which it had actually been in session fifty days.[1] Such experience would convince any active business or professional man of the inconvenience of jury service. This murmur is wide-spread. Therefore from the standpoint of the changed functions of a grand jury, of economy, and of inconvenience to citizens, the size of the grand jury has been reduced in many cases.

The constitutionality of statutes fixing the number of grand jurors has several times been tested. The federal constitution imposes no limitation upon the right of a

1. Report of Attorney-General, Vol. 27, p. 21.

state to regulate the number of grand jurors.[1] It thus limits the question to the right that legislatures possess under the constitutions of the respective states. Where the constitution has definite provisions the matter is quite simple,but where the constitution merely uses general terms litigation has been frequent. In such a case,if the common law jury existed in the territory, it is held that the constitution guarantees the common law jury and that the legislature is so bound.[2] The decisions generally hold that it is competent for a legislature,within the maximum and minimum limits prescribed by the common law,to diminish the number of grand jurors without infringing upon the rights of an accused as guaranteed by the constitution.[3]

There seems to have been no fixed common law principle which held that twenty-three must be chosen. The only inflexible rule seems to have been that it required not less than twelve nor more than twenty-three;twelve being necessary to find a true bill and not more than twenty-three being permitted in order that twelve might be a majority. Within these limits the number was indeterminate and immaterial.There might be more or less. Thus within these limits prescribed by common law it is competent for the legislature to increase or diminish the number to be drawn. The court in State vs.Barker[4] very sensibly said:"The institu-

1.Parker vs.People,13 Colo.155.
2.
3.English vs.State,31 Fla.340.
Brucker vs.State,16 Wis.333.
But see State vs.Hartley,22 Nevada,342.
4.107 N.C.913.

tion shall be understood and construed in the light and by the assistance of the common law. But this does not mean that the common law is to control the constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads,or as few as possible,may be made in the system of common law rules. Any less liberal construction would make the common law tyrannize over our constitutions,and leave them mere shams. The boasted sovereignty of the people would have received its final crown before our much heralded Declaration of Independence was enunciated,and all future development could have been checked."

This brief account of the grand jury development in the United States indicates that the states started with but few constitutional provisions regarding the system. Beginning with 1790,down to about 1875,the tendency was to rivet the system upon the judicial procedure by ironclad constitutional provisions in all new constitutions adppted. Since then the tendency has been to resort more and more to the use of the information. A few of the older states have amended their constitutions so as to permit this change,and most of the western states have adopted this method from the beginning. One-third of the states in the union have now adopted the system of prosecuting either upon indictment or upon information,with the latter method generally predomina-

ting. The federal government, the Eastern states generally, and a few scattered states throughout the rest of the country cling pretty closely to the traditional practice. Parallel with this change in the use of the grand jury has been a change in the composition of the body. The number is generally very much reduced in size in those code states where its use is merely optional. These conditions may be summarized somewhat in detail in the following table:

	REQUIRE GRAND JURY.		REQUIRE IN CERTAIN EXTREME CASES ONLY.	HOW CALLED WHERE NOT REQUIRED.	NUMBER. 1st.figure-number. 2nd.:-quorum. 3rd.:-number for indictment.
	BY CONSTITUTION.	BY STATUTE.			
Alabama	#				15-12-12
Arkansas	#				23-16-12
California				Once a year	"
Colorado				Judge may call	"
Connecticut	#		Capital, and life imprisonment.		"
Delaware	#				"
Florida	#				18-12-12
Georgia		#			23-16-12
Idaho				Judge may call	16-12-12
Illinois		#			23-16-12
Indiana		#	Murder & treason.		6-5-5
Iowa	#				23-16-12
Kansas				By petition	15-15-12
Kentucky	#				12-12-12
Louisiana		#	Capital		23-16-12
Maine	#				"
Maryland		#			"
Massachusetts		#			"
Michigan				Judge may call	"
Minnesota		#			"
Mississippi		#			20-15-12
Missouri				Judge may call	12-12-9
Montana				" " "	7-7-5
Nebraska				" " "	23-16-12
Nevada	#				17-17-12
New Hampshire		#			23-16-12
New Jersey	#				"
New York	#				"
North Carolina	#				"
North Dakota				Judge:-(1)Discretion.	"
Ohio	#			(2)Co.Commissioners.	"
Oklahoma		#			12-12-9
Oregon				Judge may call.	7-7-5
Pennsylvania	#			(3)Petition 10% voters.	23-16-12
Rhode Island	#				"
South carolina	#				"
South Dakota				As in N.D.	8-6-5
Tennessee	#				13-13-12
Texas	#				16-12-9
Utah				Judge may call	7-7-5
Vermont		#			23-16-12
Virginia		#	Capital and above 7 years.		R.:12-9-7; S.:9-6-5.
Washington				Judge may call	17-12-12
West Virginia	#				23-16-12
Wisconsin				Judge may call.	17-15-12
Wyoming				Judge may call.	12-12-9
	19	12			

Total 31

In above table opposite Virginia:-
"R" signifies 'Regular'
"S" " 'Special'

CHAPTER III.

THE FORMATION AND ORGANIZATION OF THE GRAND JURY.

After a consideration of the origin,development and present status of the grand jury system,it becomes of some interest to study the institution strucurally. This involves an analytical rather than a descriptive consideration of the machinery as it is used. It means more than simply a panoramic view of a body of men assembled for business. In it is invloved a consideration of the processes by which the body is organized,and then a consideration of the actual and potential power there represented. It is the life history of an individual body with the story of its birth,possibilities,powers,and duties that demand consideration rather than the general description of an institution.

The grand jurors are usually selected by lot by some officer of the court from a list previously prepared. The method of selecting the names to place upon this list varies a great deal in American practice. Under common law this list was selected by the sheriff. This official has always played a very important part in the administration of English law. He is a highly respective public dignitary with great prestige and hon-

orable traditions back of him. Under such conditions he is the natural officer to select the men that are to assist him in putting offenders to justice and in ferreting out crime. The work has usually been done with a conscientious desire to select the most representative men of the community to perform this patriotic service. Public opinion has demanded and the sheriffs have responded.

In our American practice it was but natural that this same method should be adopted. But it has not continued to give such universal satisfaction . The dignity of the office of sheriff has been much degraded. The office has largely fallen under our system of political spoils. The sheriff may simply be some party henchman who who has been rewarded for his ward service. After he gets into office it can hardly be expected of him that he should forget all his old political animosities, and,certainly,he cannot afford to neglect his political future. This right of selecting the grand jury men puts a tremendous power into his hands to accomplish either or both. This privilege entrusts into the hands of one man great power for justice or injustice. As Governor Stokes of New Jersey said:"If unfairly used it can impair reputation,put life and property in jeopardy,or allow the wrong-doer to escape the consequences of his crime."[1] Certainly the selection of a grand jury at the mere per-

1.Message of January 14,1908---Albany Comp Leg.Bulletin 1908,Sec.213.

sonal whim of a sheriff, in the hands of one who holds lightly his obligations of office, is the most dangerous power. The criminal machinery of the state with all its power and ignomy may be directed most unjustly against any person to gratify personal or political ends, and on the other hand such a sheriff may block the enforcement of the criminal law by selecting a grand jury that will not indict. Such seems to have been the American experience, and so long as the character of the office remains what it is, this system will meet criticism.

At the present time but one state retains this system and there it seems to be unsatisfactory. Various systems have been adopted to meet this demand. In many states the county commissioners or supervisors select the names.[1] The practice in Minnesota in counties of 100,000 is that the judges of the district court select the names, each judge usually contributing nearly an equal share to the list of 125 names that are required. It is made illegal to put any name on the list at the suggestion of any one and makes it an offense to ~~they~~ suggest or urge any name upon the judge. It has been become a fixed practice of The Hennepin and Ramsey County courts not to select any names unless the individual is personally known to the judge and is known to be capable.[2]

In cidentally it may be suggested that it would be a good plan for what-ever body selects the names to have

1. Cal., Colo., N.D., S.D., Fla., Idaho, Ill., Minn., Miss., Neb., N.Y., Wash., Wis., Wyoming,
2. Judge Holt of Hennepin County District Court.

some acquaintance with the persons selected. It would prevent such a deplorable condition of affairs as was presented in a case where,among the twenty-three names drawn by the clerk,one was dead,one was not a citizen of the United States,and six were no longer residents of the county.[1]

Other systems of selecting jurors prevail, In some states jury commissioners exist in each county to prepare the jury list.[2] In several New England states the selectmen of the town choose the names.[3] Other scattered methods prevail as where the parish judge,sheriff and two electors make the selection,or where the county judge and one county commissioner do the work.[4]

The American experience seems to be that so long as the office of sheriff retains its present political character it is best to lodge this power in some other body less directly interested in the consequences,less influenced by political motives,and more representative.

The federal statutes regulating the selection of grand jurors permit of considerable variation in practice. They provide that "jurors to serve in the courts of the United States,in each state respectively,shall have the same qualifications as jurors of the highest

1.Pope County---State vs.Russell-69 Minn.502.
2.Ark.,Ga.,Ind.,Ky.,N.C.,Pa.,S.C.,Texas.
3.Conn.,Mass.,Me.,N.H.
4.La.,Nev.

attend any district or circuit court unless "one of the judges of such circuit court,or the judge of each district,in his own discretion,or upon notification by the district attorney that such jury will be needed,orders a venire to issue therefor."[1] A grand jury summoned in either of these jurisdictions may take recognizance of cases coming up in the other.[2]

In selecting the names for a grand jury or in drawing them from the jury-box certain irregularities may creep in and therefore it becomes of some importance to note the effect of such actions on subsequent proceedings. Irregularities in the selection of a grand jury will not invalidate subsequent proceedings unless it is clearly proved that the irregularity has affected to a disadvantage the substantial rights of the individual. The courts are quite strict in discountenancing irregularities. All merely clerical errors are not of this sort,as where a list was not certified to by the clerk of the board.[3] Such error cannot be used to set aside an indictment. It may be taken advantage of by challenge to the panel if the accused is held on a charge of a public offense,or on a motion to quash before arraignment if not so held; but if that is not done all rights are waived,unless the court gives

1.U.S.Comp.Statutes 1901---Section 808.
2.Ibid,Sec.810.
3.State vs.Gruman,23 Minn.209;State vs.Russell,69 Minn/502.

leave to do so after arraignment.[1] Likewise the fact that a person acted as member of the board without authority is not a ground for setting aside an indictment. It simply makes the proceedings irregular,not void.[2] The acts of such de facto officers as to third persons are as valid as the acts of officers de jure. A list of grand jurors has been held sufficient though it was under the same heading as the petit jury list,and there was but one certificate for the two lists.[3] In New York an indictment found by a defacto jury organized under an invalid statute has been sustained for a similar reason. The jury was selected under the color of law and semblance of legal authority. The defendant enjoyed all the safeguards of a legal jury and therefore had no substantial right denied to him.[4] The exclusion by the supervisors of persons who are competent is no ground for a challenge to the array.[5] Where a statute provides the manner in which grand jurors shall be selected it does not necessarily exclude the common law method,unless the statute is exclusive;and if an exigency arises,a a court may direct an open venire to the sheriff for the selection and summoning of a new panel.[6] In any and all these cases it is too late to raise the objection after demurrer,[7] and likewise it cannot be raised by motion in arrest of judgment.[8]

1.State vs.Schumm--47 Minn.373.
2.State vs.Russell--69 Minn.502.
3.People vs.Petrea--92 N.Y.128.
4.State vs.Peterson--61 Minn.73.
5.People vs.Jewett--3 Wend.(N.Y.)314.
6.MacKey vs.People--2 Cal.13;White vs.People--81 Ill.33.
7.State vs.Thomas--19 Minn.484.
8.State vs. Conway--23 Minn.291.

These cases show the general trend of the decisions on irregularities occurring in the selection of a grand jury. Such errors do not make their proceedings void, providing the jurors themselves are not personally disqualified. This is so because an accused person loses nona of his substantial rights by these harmless errors. In some states it is provided by statute that the persons impanelled shall be the grand jury notwithstanding irregularities in the selection of the body. Such provisions have been held to be constitutional.[1]

A few words should be said in regard to the number of grand jurors required for action. It has already been pointed out that this number varies greatly among the different states. It now remains to be seen what the effect is of a greater or less number on the panel than the law prescribes. Under the common law more than twenty-three cannot legally act, and less than twelve cannot act because the concurrence of that number is required for an indictment. Whatever is the size of the jury as prescribed by law, all on the panel in excess of the legal number are not bound by the oath and their presence in the jury room destroys the secrecy of the action of the body and vitiates the indictment.[2] If however only the legal number serve, whatever number may have been drawn, summoned, impanelled, and sworn the indictments found by such a body will be sustained, for the defendant will in no manner be prejudiced. ~~by this lack of maximum number~~.[3]

1. Commonwealth vs. Brown, 121 Mass. 69.
2. Crimm vs. Commonwealth, 119 Mass. 326; State vs. Fee, 19 Wis. 5-62.
3. Turner vs. State, 78 Georgia, 174.

The practice as to the effect of less than the minimum number on the panel varies somewhat. If the minimum required to constitute a grand jury is the same as that required for an indictment, of course, a number less than this cannot legally act. Where, however, the quorum is a number larger than that required to find an indictment the rule seems to be, if the legal number be impanelled and afterward some of the grand jurors absent themselves, the remainder may still find an indictment providing the legal no. concur in the finding. The decisions upon this point are by no means uniform but since the decision of the United States Supreme Court upon this question in the case of In re Wilson[1] the above principle seems to be accepted. In that case the court refused to release on a habeas corpus proceeding a person who was, under the above conditions, indicted by a jury of fifteen where the statute provided for a minimum number of seventeen, and this even though the defendant had no knowledge of this irregularity until after sentence had been passed and therefore had no opportunity to challenge. Mr. Justice Brewer argued: "If the two had been present and had voted against the indictment, still such opposing votes would not have prevented the finding by the concurrence of the twelve who did in fact vote for it. It would seem, therefore, as though the error was not prejudicial to the substantial rights of the petitioner." Exception could, however, have been taken to the grand jury so constituted either by a plea in abatement

1. 140 U.S., 575.

or motion to quash,for the indictment thus found is not that of a legal jury. This defect will,however,be cured by the plea of the general issue.[1]

The course of these decisions seems to be that when a grand jury begins action with such a number as to constitute it a legal body,subsequent withdrawal of its members as to bring the number below the legal number, does not affect the validity of the findings of the remaining jurors provided the required number concur.

Next we may consider who are eligible for grand jury service. Blackstone has little to say about the eligibility of grand jurors. He lays down but few specific qualifications."They ought to be freeholders,but what amount is uncertain;" in two other sentences he indulges in general description; "they ought to be good and lawful men of the county", and "they are usually gentlemen of the best figure in the county".[2] The qualifications that are emphasized are morality,citizenship,residence in the county, and freeholder,although this qualification does not seem to have been generally required under the common law.[3] These same qualifications are still mainly emphasized in American law. The older states usually require the grand juror to be a freeholder. Some of the newer simply require him to be a citizen,while some,among which is Minnesota, provide that every qualified voter shall be liable to be

1.State vs.Cooley--72 Minn.476.
2.Commentaries,Vol.IV,pp.302-8.
3.1 Chitty--Criminal Law,308.

drawn for the service. Residence in the county is usually insisted upon and often a minimum time limit of residence is required.[1] In some jurisdictions it is required by statutory of constitutional provisions that a grand juror be a tax-payer,[2] or a taxable person,[3] or that he is not in default in the payment of these taxes.[4] Certain educational qualifications are often required, such as ability to speak, read and write the English language; indeed, in the absence of any statute, ignorance of the language in which the proceedings are conducted is a disqualification.[5]

Generally no inquiry is allowed as to whether the individuals selected do or do not belong to a particular society, sect or denomination, social, benevolent, political or religious. "Neither religious beliefs, nor church adhesion, nor membership in or affiliation with a political party affect the qualifications of a grand juror."[6] And yet a person who has conscientious scruples against capital punishment, or who could not, upon his conscience, find an indictment under the law, has been held incompetent as a grand juror.[7]

In an early case in the territory of Utah it was held that a person who has conscientious scruples against indicting persons for the crime of polygamy is wholly incompetent to serve as a grand juror.[8] An act of March 22, 1882, makes the above condition a ground for challenge in

1. Iowa and Ohio.
2. Montana and South Carolina.
3. Oregon.
4. Fla. and N.C.
5. U.S. vs. Benson--31 Federal, 896.
6. People vs. Jewett--3 Wend. (N.Y.) p. 314.
7. Gross vs. State--2 Ind. 329.
8. U.S. vs. Reynolds--1 Utah 226.

the investigation of cases of polygamy,thus ratifying the decision of the territorial court.[1]

Bias or prejudice,formation or expression of opinion,interest in the prosecution and family relationship do not,as a rule,disqualify a grand juror. Such relationships may,however,be taken advantage of by challenge where the latter is not exclusive by statutory provisions.[2]

There are usually certain disqualifications enumerated in order that "gentlemen of the best figure in the county" may be secured. In Minnesota "all persons unable to speak the English language,all persons whose names have been placed upon the jury list at the request or suggestion,direct or indirect,of any person other than the officer charged with preparing such list,and all persons who shall have been convicted of any infamous crime shall be disqualified from serving as grand jurors."[3] In addition there is usually a list of enumerated exceptions which do not disqualify a person from service but leave it optional with him whether he will serve or not. Such a list in Minnesota includes "United States officers,judges of courts of record,commissioners of public buildings,the state auditor,treasurer,and librarian,all county and city officers, including members of the school board in cities of the first class,constables,attorneys-at-law,ministers of the gospel,

1.U.S.Statutes at large,1862--Ch.47.
2.See Cyclopedia of Law and Procedure,Vol XX.pp.1301-3.
3.Revised Laws of 1905,Sec.5263.

preceptors and teachers of High Schools and graded schools and academies,one teacher in each common school, practicing physicians and surgeons,one miller to each grist mill,one ferryman to each licensed ferry,all acting telegraph operators,all members of fire companies organized according to law,all engineers actively engaged as locomotive or stationary engineers,all persons more than sixty years of age,all persons not of sound mind or discretion,and all persons subject to any bodily infirmity amounting to disability."[1] In general these exemptions,some of which seems to have been made without much reason,are made for such cases where compulsory service by the individual would work some public hardship.

Officers of the U.S.have the right to be excused from serving as grand jurors in the state courts but they are not disqualified to act as such.[2] It does not yet seem settled whether an employe of the federal government can be compelled to serve in the state courts as a juror. As early as 1800 "all articers and workmen employed in the arsenals and armories of the United States were exempted during their term of service from jury service in any form."[3] Early in the nineties such a person was drawn by a state court and the Secretary of War applied to the Attorney-General in regard to the legality of the act. The judge of the state court said that he would excuse the person in case it was

1.Revised Laws of 1905--Sec.5263.
2.State vs.Quimby--51 Minn.395.
3.Revised Statutes--Sec.1671.

demonstrated that the public service demanded it,but insisted on the right of drawing. Under the circumstances the Attorney-General dodged the issue saying,"No such serious occasion is shown to have arisen as would justify the Attorney-General reviewing the ruling of a state judge".[1] In this review the Attorney-General expresses the opinion that the question of the right to enlist federal employes for such service has never been determined.

The decisions on the question of disqualified grand jurors follow much the same liberal tendency as those in the case of irregularities in the selection of the body. When a grand jury is composed of not less than sixteen and not more than twenty-three its action is not vitiated by reason of there being drawn as one member thereof a disqualified person,he having been excused before the charge in the indictment is considered.[2] This same principle will undoubtedly hold where the jury by statute consists of a smaller number. Leave to withdraw a plea of not guilty for the purpose of enabling the accused to move to quash the indictment on the ground that two members of the grand jury has been held properly denied. It lies within the discretion of the trial judge to decide whether any primary rights have been affected.[3] Where a statute provides that certain persons may be excused from jury duty,it has been held that such exemptions are not disqualifications that may

1.Opinions of Attorney-General U.S.--Vol.XX.p.618.
2.State vs.Cooley--72 Minn.476.
3.State vs.Arbes--70 Minn.462.

be excepted to by the defendant.[1] In general very few disqualifications will be recognized by the courts except those specifically stated in the statutes. Action by a grand jury that has a disqualified person on its person is not necessarily void but is voidable provided the proper exceptions are taken at the right time. Unless a person avails himself of these privileges according to the legal procedure he is presumed to have waived his rights. Usually the remedy for an incompetent juror is challenge by those held for trial and a motion to quash the indictment before pleading by those who are not so held at the time the jury is impanelled. In such a case an objection to the disqualification of a grand juror comes too late after a plea to the merits.

A person accused of an offense has a right to take advantage of every irregularity in the proceedings on the part of officers selected to administer the law, and of the personal disqualifications of the jurors provided he does it at the proper time. A person held to answer a crime may enforce his rights by means of a challenge, either to the panel or to an individual juror. The grounds for challenge are usually stated in the statutes and are often exclusive of the common law challenge.

The grounds for challenge to an individual juror in Minnesota may be interposed for any one or more of the fol-

1. State vs. Brown--12 Minn., 538.

lowing causes:

1. That he is a minor.
2. That he is not a citizen of the United States.
3. That he has not resided in this state six months.
4. That he is insane.
5. That he is a prosecutor upon a charge against the defendant.
6. That he is a witness on the part of the prosecution, and has been served with process or bound by recognizance as such.
7. That a state of mind exists on his part in reference to the case or to either party which shall satisfy the court, in the exercise of a sound discretion, that he cannot act impartially and without prejudice to the substantial rights of the party challenging.[1]

A challenge to an individual juror must in all cases be made before the jury retires.[2] This rule applies to those who are imprisoned at the time the jury is impaneled.[3] The prisoner is presumed to know when the grand jury meets. It is a matter fixed by law and ignorance of the law offers no excuse even under these circumstances. The prisoner has not the privilege of sleeping upon his rights and then holding this negligence fatal. Such a view of his rights would give him the power to avoid indictment in a large number of cases. The court is not bound to give notice to the prisoner of the fact

1. Revised Laws of 1905--Sec.5273.
2. State vs. Ames--90 Minn.183.
3. Maker vs. State--3 Minn.444.

that a grand jury is about to be impanelled. The right to challenge a juror is limited to those who are held to answer a charge of a public offense.[1]

In Minnesota a challenge to the panel may be interposed for one or more only of the following causes:

1. That the requisite number of ballots was not drawn from the grand jury box of the county.
2. That the drawing was not had in the presence of the officers designated by law.
3. That the drawing was not had at least fifteen days before the court.[2]

The time for interposing a challenge to the panel is exactly the same as that to an individual juror. A challenge will lie on the ground that the list was not properly signed and certified by the chairman of the county board, under the first cause for challenge; the requisite number of ballots were not drawn from the grand jury box, as there were no legal names from which to draw.[3] An objection in the nature of a challenge to the panel may be made by a motion to quash, by a person who was not held at the time the jury was impanelled; but "such a person cannot move to quash on any of the statutory grounds of challenge to individual jurors--at least, on the ground of bias or prejudice."[4] A persone held for a public offense must exercise his right to challenge the panel before the jury retires and this also

1. State vs. Ames--90 Minn., 183.
2. 2. Revised Laws of 1905, Sec. 5272.
3. State vs. Gruman-- 23 Minn., 209.
4. State vs. Ames--90 Minn., 183.

though he is in prison at the time.[1] He cannot object by a motion to quash the indictment.[2] The right to object to the panel is likewise limited to a person held for trial.[3]

The effect of the allowance of a challenge extends only to the case of the person who interposes the challenge. It does not incapacitate for other cases. If a challenge to the panel is allowed, the grand jury is prohibited from inquiring into the charges against the defendant by whom the challenge was interposed; if they should, notwithstanding, do so, and find an indictment against him, the court should direct it to be set aside. If a challenge against some individual grand juror is allowed, he cannot take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon. His place may, but need not unless it is necessary to secure a quorum, be filled as is provided in case of a deficiency of grand jurors.

After a person has been duly drawn and summoned to attend as a grand juror he is subject to the direction of the court, and, if he shall, without sufficient excuse, neglect to attend, he is subject to a fine.[4] A failure to report constitutes contempt of court[5] and is summarily disposed of by the judge. In Minnesota every person guilty of such contempt shall be punished by imprisonment in the county jail for not more than

1. 13 Minn.--132.
2. State vs. Gruman--23 Minn. 209.
3. 22 Minn.--423.
4. Revised Laws of 1905--Sec. 5266.
5. Ibid--Sec. 5267.

90 days,or by a fine of not more than $500,or by both.[1]

The grounds given for excuses in the Minnesota statutes read as follows:"The court shall not excuse from service upon either the grand or the petit jury any person duly drawn and summoned,except upon the ground that he is either physically or mentally unable or unfit,in the opinion of the court,to attend or serve as a juror, or by reason of serious sickness of some immediate member of his family.

"Provided that in counties having more than two terms of court a year,the court may,for other sufficient causes excuse a juror from service at one term until a later term in the same year".[2] The grounds upon which an excuse is made are made part of the record of the court subject to inspection by all parties.[3]

It has been held that the court may excuse any juror on these statutory grounds at its own discretion,independently of any appeal by the juror in his own behalf. The court in its discretion may excuse a juror for over-age without the consent of the accused.[4] A recent decision confirmed a rather extensive power in this regard. It held that a court could on its own motion and independently of the statute excuse a juror who appears disqualified for any reason. The Supreme Court said in part: "We have no doubt but

1.Revised Laws of 1905--Sec.5269.
2.Laws of 1909--Ch.407.
3.Revised Laws of 1905--Sec.5268.
4.State vs.Brown--12 Minn.538.

that in the orderly conduct of business, ~~the court~~ in the formation and submission of matters to a grand jury, the trial court is clothed with reasonable judicial discretion to excuse jurors and that the court is not to be deprived of such authority because the legislature has seen fit to declare one or more grounds of excuse for relieving such juror from service--------. In other words, its acts were judicial, not arbitrary, and tended to promote a fair consideration of the rights of the accused person." When a disqualified person is excused the accused cannot complain that a new juror is not summoned in his place if a quorum remains.[1] This agrees with the principle that a person cannot insist on a full grand jury, because the smaller the number the more secure he is against an indictment.

Generally where the court excuses a juror on its own motion it is done before the jury is sworn. It has benn permitted even after the jury was sworn, but the reasons must be very evident. The decisions in regard to such practice vary greatly.[2] The exigency of each case will have to determine whether the judge acted properly.

It can safely be said that ordinarily the court alone has the power to excuse a grand juror, but certain exceptions have been sustained. For good and sufficient reasons

1. State vs. Cooley--72 Minn., 476.
2. For citations see Cyclopedia of Law and Procedure, Vol. XX., p. 1331.

the foreman may excuse a juror.[1] The grand jury itself in at least one instance excused one of their own members,but the court very much discredited the action.It, however,refused to quash the indictment because no substantial rights of the defendant were affected.[2] The better practice would seem to be to have such cases reported to the court and leave the final decision with that authority. It would add greater regularity to the proceedings.

Where it happens that less than the requisite number of persons are present to constitute a grand jury,it is usually provided by statute how the additional jurors may be secured. The Minnesota statutes provide: "In case of a deficiency of grand jurors,a special venire may be issued to the proper officer to return forthway such further number of grand jurors as shall be required,and he shall summon such persons,who shall be bound forthwith to serve,unless excused by the court in the same manner---- as provided by law".[3]

A deficiency may occur either at the time of the organization of the grand jury by a failure of a sufficient number to appear,or at any subsequent period by death,disease,challenges to individual jurors or to the panel,or other unavoidable causes.[4] Objection that additional jurors are improperly or irregularly summoned by a special venire cannot be raised after arraignment,[5] thus following the same

1.State vs.Perry--122 N.C.,1018.
2.Smith vs.State--19 Texas,95.
3.Revised Laws of 1905--Sec.5270.
4.State vs.Russell--69 Minn.502.
5.State vs.Schuman--47 Minn.373.

general principle as is applied in the first instance.

After a grand jury has been selected it is provided with a foreman. In some states the court and in others the grand jurors themselves are authorized to make the appointment. The former method generally prevails. In case such a foreman is discharged or excused before the jury is dismissed another must be selected. But it has been held that where the indictment is endorsed a true bill and is returned by the authority of the entire grand jury, it is sufficient without the special appointment of a foreman.[1] The appointment should be indicated upon the records of the court, but here as usual with such harmless irregularities less conclusive evidence will be accepted, as where the records show that the oath is administered to the foreman.[2]

Grand juries are not completely organized for business until sworn in accordance with the oath required to be administered under the common law or prescribed by statute. A failure to swear invalidates any action taken by such a body. The oath prescribed by the statutes of Minnesota reads thus: "You each do swear that you will diligently inquire and true presentment make, of all public offenses committed within this county of which you have legal proof; the counsel of the state and of yourself and fellows you will keep secret; you will present no person through malice or ill-will, nor leave any unpresented through fear or favor, or the receipt or hope of reward, but will present things truly to the best of your under-

1. Peter vs. State--3 Howard (Miss.) 433.
2. State vs. Gouge--12 Lea (Tenn.) 132.

standing and according to law".[1] The oath is usually administered to the entire number in a body. Sometimes the oath is first administered to the foreman and then to the remaining members either in a body or in sections.[2] The same oath must be administered to any grand juror admitted later. It may be administered by any person authorized to do so whom the court may appoint. An accused has no right or authority to question the form of oath administered to the grand jury.[3]

The clerk of the grand jury is usually one appointed by the grand jury of their own number, who is selected after they have been sworn and retired to their room. In his absence or inability to act another grand juror is appointed to the place. His duties consist of merely preserving the minutes of the proceedings, exclusive of the votes of the individual members, or of the evidence given before them. The same rule regarding secrecy apply to him as to any other grand juror and this although he is not a one of their members.

The term of service of a grand jury is usually regulated by statute. A term of court or other particular period is used in some states, while in others it is left almost entirely to the discretion of the court. It is the general rule that a grand jury does not cease to exist until it is dissolved by the operation of the law or by order of the court; it cannot dissolve itself. Minnesota, in certain

1. Revised Laws of 1905--Sec. 2679.
2. Brown vs. State--10 Ark., 607.
3. West vs. State--6 Texas, 485.

counties with several short term courts during the year, permits a grand jury to be continued over from one term to another.[1] A court may dismiss or adjourn a jury whenever it deems it proper to do so.

A temporary adjourment of the court does not necessarily adjourn the grand jury, where the actual presence of the court is not required for the exercise of its functions. Under such circumstances it may continue in spite of the temporary absence of the judge.[2]

In the absence of a statutory provision to that effect, the attendance of a petit jury is not necessary to the validity of the action of the grand jury.[3] A vacancy in the office of prosecuting attorney is no bar to the validity of the action of a grand jury.[4]

Practice varies somewhat as to what should be done in case a grand jury is dissolved before the end of the term, and new matter comes up which ought to demand immediate attention of the grand jury. Usually a special grand jury is summoned to consider the matter, but recently some states have provided that the old jury may be resummoned at any time during the term at the discretion of the court.[5] This eliminates the necessity of special grand juries.

A special grand jury has its place in the administration of justice. Circumstances may arise under which it would clearly be a travesty of justice to continue an existing, in-

1. Revised Laws of 1905, Sec. 5277.
2. Commomwealth vs. Bannon--97 Mass., 214.
3. State vs. Davis--22 Minn., 423.
4. State vs. Gunzales--26 Texas, 197.
5. Md., Ore., Texas, Wash.

competent jury. Some provisions analogous to impeachment or recall in the political practice must be retained to dissolve such a body. This power is perhaps best placed in the hands of the judge. For ordinary purposes it expedites business to permit a grand jury to be resummoned, but such provisions should not make exclusive the power to dissolve an existing jury and summon a special jury when the welfare of the community demands it.

In the selection of grand jurors both the federal and the state authorities must observe the fourteenth amendment to the constitution and subsequent legislation enacted for its enforcement. The spirit and meaning of that amendment intended that citizenship of the black people should give to them all the civil rights that are enjoyed by white people. All race discrimination was to be abolished from our legal system. It has, therefore, been held that all statutory discrimination against negroes serving on grand juries are unconstitutional.[1] The Supreme Court has gone one step farther and declared that a state judge in fulfilling his legal duty of selecting ~~of~~ the grand jury cannot at his own discretion exclude therefrom because of ~~their~~ color. It was held that this was not a judicial act, that the judge was simply performing a ministerial duty which might have been assigned by statute to most any other person.[2] This decision was fully warranted by the act of March 1, 1875, which enacts that "no citizen, possessing all other qualifications which are or may be pre-

1. Strauger vs. West Va.--100 U.S., 303.
2. Ex parte Va.--100 U.S., 339.

scribed by law shall be disqualified for service as a grand or petit juror in any court of the United States, or of any state,on account of race,color,or previous condition of servitude;and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall,on conviction thereof,be deemed guilty of a dismeanor and be fined not more than $5000."

The effect of allthis--the amendment,the statute, and the decisions--is that in the selections of grand jurors no discrimination can be made on account of race, color,or previous condition of servitude. These provisions do not,however, limit either government from describing the qualification of its jurors in all other respects. The selection may be confined to males,to freeholders,to citizens,to persons within certain ages,to persons having certain educational qualifications,or persons with other qualifications. The only limitations are that such qualifications or disqualifications must not contravene the spirit of the amendment.

This chapter has been concerned in a general way with the formation and organization of the grand jury. Only the most general principles have been presented with such illustrations as would tend to indicate the character of the rulings on the different points. No cer-

tain rule can be laid down that will have national recognition. With our forty-six different states each with its own statutes and court decisions it is not strange that the variations upon technical points seem almost interminable. It is,however,gratifying to note a growing tendency toward uniformity. The federal courts have acted as mediators.More and more the state courts seem to follow the rulings of the national courts and consequently the earlier contradictions are somewhat disappearing. An attempt has been made to discern,if possible,the tendencies in this movement toward inter-state uniformity and to present the rules that are being generally adopted. With a great variety of individual cases each with its own peculiar problem finality is impossible through general rules. No iron-clad laws are workable and a great deal of judicial discretion must always be allowed in order that a court may not be compelled to shut its eyes to the justice of the case,when an error in matter of form can be rectified without prejudice to the rights of the accused.

CHAPTER IV.

POWERS, DUTIES AND RESPONSIBILITIES OF THE GRAND JURY.

The preceding discussion has been concerned with the development and organization of the grand jury. In this chapter an attempt will be made to indicate some of the most important aspects of the nature and scope of a legally constituted grand jury.

The task is no easy or simple one. The common law principles furnish no certain and absolute guide, because many were not definitely formulated at the beginning of our national existence. The problem here has been much complicated thru the multiplicity of jurisdictions. There are the federal and the state laws governing these questions, and the decisions of the federal courts and of fourty-six state courts interpreting them. Their decisions not only vary in accord with the different statutes, but also as to the common law principles,-that is, the very basis of the institution. The complexity is thus self-evident and, yet, there are such common relations as will warrant a general discussion in which certain interesting variations may be indicated.

In a discussion on the powers and duties of a grand jury, the double nature of the institution should carefully be borne in mind. In its primary sense the body today is concerned with bringing offenders before the bar of justice, but there still clings to the institution much of its earlier administrative character. It is in this latter respect that the greatest differences occur in the legal provisions of the different states.

Among the time-honored Prerogatives of the grand jury

are those of inquiring into the condition and management of the public prisons and buildings of the county, and into the wilful and corrupt misconduct in office of public officials. In this respect the grand jury usually possess extensive inquisitorial powers. They function as a kind of building inspection commission and investigating and auditing board. A statute of Alabama makes provision for inpeachment proceedings upon the report of a grand jury charging misconduct in a public official, and it has been held that the report need not set forth the misconduct complained of with the same degree of accuracy usually required in an indictment. A succinct statement of the nature of the acts of malfeasance is sufficient.[1]

In addition to these well recognized powers others of an even greater administrative character are found in the statutes of many states. Georgia affords some interesting samples; county commissioners may be chosen by the grand jury, they shall examine into the pension rolls of the county, they may, at their discretion, authorize a physician to be regularly employed by the coroner, they shall examine into the lists of voters and indict for irregularities; and they have authority in certain cases to make a special tax levy for the county.[2] Equally administrative is a provision by which grand juries control the division of the road and bridge appropriations of the county among the several townships.[3] Such provisions invest the body with rather extensive governing functions and exist as interesting relics of an earlier, more common power.

Nearly every state has a considerable number of special charges to give the grand jury for consideration, often depending upon peculiar local conditions. Election frauds, trespasses on

1.Groves vs.State,23 Ga.205. 2.Code of Ga.1895.Vol.3,p.836.
3.In re Bridge Appropriations 9 Kulp (Pa.) 427.

state lands, violations of the game laws, illegal sale of intoxicating liquors, the social evil, - are among the leading public nuisances which the laws especially enjoin the grand jurors to consider. There exists, however, little doubt but that these evils may be run down without specific authority for so doing. The statutory provisions simply emphasize the duty of the grand jury and give them unquestioned power in the enumerated cases.

In the absence of statutory provisions granting power in particular cases and in the absence of prohibitions upon the power, a grand jury may investigate into every crime known to the law;[1] and which comes before them in one of the methods provided by law. But in making these investigations the grand jury is not wholly unrestrained. It works within certain well established principles of law. It may only inquire into offenses committed within its territorial jurisdiction,[2] and not outlawed by the statute of limitation.[3] Within these limits there are in general four ways by which a case may come before a grand jury. The first two may be designated as official and the last two as unofficial. Officially a case may come before the body either by the court giving a matter specially in charge or by the prosecuting attorney submitting the case to them for action. Unofficially cases are brought to their attention either thru their own knowledge and observation or thru the knowledge that is gained in the course of their investigations into other matters.

The Court orders or recommends matters for investigation in its charge to the grand jury . This is given after the jurors are duly impaneled and sworn. It should be repeated when

1.Quimby vs.Corbett,3 Mont.50.
2.People vs.Beatty,14 Cal.566,& Rutzell vs.State,15 Ark.,67.
3.People vs.Beatty,14 Cal.,566; State vs.Overstreet,128 Mo.,470.

a new juror is added.[1] The charge usually consists of reading certain sections of the statutes relative to the duties of a grand jury, calling attention to those things which the statutes require the court expressly to give in charge, and giving such other information as the court may deem proper. The court may at any time during the period of service of the jury, deliver a supplementary charge upon any special matter which the district attorney may be prepared to send before them, or may direct them to investigate any matters of grave importance to the public welfare.[2] In practice this is rarely done. While in regular procedure it is the duty of the court to charge the grand jury, an indictment will not be invalidated should this be omitted.[3]

The matter which a court may call to the attention of the grand jury, aside from what is legally required, rests entirely with the discretion of the judge. Most judges today give very brief charges. However, in times past some very interesting lectures have been delivered on these occasions. They afford the judge an excellent opportunity to inculcate principles of good government, to explain our institutions and theory of government, and to impress upon the jurors the duties of citizenship. The importance of the institutions has been impressed upon the minds of the jurors in such words as these: "The grand jury are a great channel of communication between those who make and administer the law, and those for whom the laws are made and administered,"[4] and "To grand juries is committed the preservation of the peace of the county, the care of bringing to light for examination, trial and punishment, all violence outrage, indecency and terror, everything that may occasion danger, disturbance or dismay to the citizens.

1.State vs.Froiseth,16 Minn.313,277. 2.U.S.vs.Watkins,28 Fed.Cases 813
3.State vs.Froiseth,16 Minn.313.
4.Jas.Wilson's Works,Vol.II,p.366.

Grand juries are watchmen, stationed by the laws to survey the conduct of their fellow citizens, and inquire when and by whom public authority has been violated, or our constitution or laws infringed"[1] This affords a valuable means of communication with the public.

In directing the investigation of matters the court usually limits its instructions to matters of general public import, which, from their nature and operation in the community, justify such intervention. The actions of the court on such occasions bear rather on things or conditions than on persons, the object being the suppression of general and public evils influence and operation communities rather than effecting in their individuals. They are, therefore, more properly the subject of a general than a special complaint. Great riots which shake the social fabric, general public nuisances affecting the public health and comfort, and flagrant vices tending to corrupt and debauch the public morals are some of the conditions considered in such charges.

The discretionary part of a charge is made general rather than specific, directed to conditions rather than persons, in order that the court may not prejudice at the very beginning a case that may come before it for trial. The mere use of inflamatory language in a charge will not invalidate indictments found upon the charge, if the charge be in general terms, for a defendant can hardly complain that he was prejudiced thereby.[2] Should the court, however, by such language urge the finding of a particular indictment, or in any manner endeavor to influence the finding of the grand jury, the probabilities are that a bill so found will be quashed.[3]

1.Mr.Justice Field--30 Fed.Cases-992.
2.Parker vs.Territory,52 Pac.,361.
3.State vs.Will,97 Iowa,58;People vs.Glen,173 N.Y.,395.

After the charge of the court the grand jury retire, and it is then that the second official means of getting a matter before them begins to operate. It is then that the prosecuting attorney may commit to their consideration what ever specific cases he may have. While the court lays general matters before them, the prosecutor lays particular cases before them. This may be done without previous binding over and commitment of the accused. The lawfulness of such practice is undoubted.[1] Indeed occasions necessitate and justify such actions as where the accused has fled the state, or where a less prompt mode of proceeding might lead to the escape of the offender. This power is usually exercised cautiously, often in cooperation with the court.

The third mode of instituting the proceedings before a grand jury is that in which they act upon their own knowledge or observation. This, as has been repeatedly emphasized, constituted the principle means of bringing actions against offenders in the early history of the institution, and as has likewise been pointed out, today in most localities can be little relied upon for effectiveness. Where the indictment is filed solely upon the disclosure of their own numbers, there are, of course, no witnesses before the body. There seems to be some confusion as to the legal requirements of evidence in such cases. In Massachussetts it has been held that an indictment may be found upon the testimony given from the personal knowledge of one of its numbers.[2] In North Carolina, where a bill is found upon the evidence of a grand juror, he must be regularly sworn as a witness and noted as such.[3] Where a presentment is filed upon the disclosures of one of their own number and an indictment is drawn up on the strength of this,

1. People vs. McCarthy, 168 N.Y. 549.
2. Com. vs. Hayden, 163 Mass., 453.
3. State vs. Cain, 1 Hawks, 352.

it is nesessary to summon witnesses in support of the averments before a true bill can be found in the state of Tennessee,[1] on the other hand, in Georgia an indictment founded on a presentment of a grand jury need not again be sent before them for action upon it.[2] The safer way, in the face of these conflicting opinions, would seem to be, to have witnesses summoned before them or swear their own member as a witness and then find an indictment true or not true.

The final way in which a matter may come before the grand jury is thru knowledge that is grained in the course of the investigations that are brought before them. If, while investigating one crime, they are satisfied from the evidence that has been adduced that another person ~~has also committed a crime~~ has also committed a crime, they may find an indictment against the latter. Thus if the grand jury is convinced that the witness before them has perjured himself, they may indict him for the crime.[3]

Besides the questions of territorial jurisdiction, the statutes of limitation, and the method by which a case may legally come before a grand jury, there are certain other considerations in regard to the extent of its powers. It may indict for offences committed subsequent to the impaneling of the body.[4] It has no power to declare the degree of the offense within the crime charged in the indictment.[5] It must determine the charge, murder or manslaughter, grand or petit larceny, but it cannot specify the degree within these, as manslaughter in the first or second degree. All such declarations should be disregarded. In general no preliminary hearing before a magistrate is required in order that a case may be brought before a grand jury, unless it is guaranteed by law. New Hampshire requires preliminary hearing

1.State vs.Love,4 Hamph.,255. 2.Mun vs.State,1 Kelley,345.
3.State vs.Terry,30 Mo.,368. 4.People vs.Beatty,14 Cal.,566.
5. " " Nichols,34 Cal.,211.

in all cases of assault.[1] The evident purpose of this provision is to keep trivial cases out of the hands of the grand jury. Should an indictment be filed while an examination is pending in an inferior court, the latter is immediately ousted of all jurisdiction.[2] A rule announced most emphatically in the federal courts[3] and generally followed in the different states is, that the grand jury must not allow private prosecutors to intrude themselves into their presence and present accusations. Such matters must be presented to them thru the official channels either by the court or the prosecuting attorney.

A very interesting federal decision upholds the independence of the grand jury from governmental, especially administrative, control. It has been held that the authority of the grand jury to investigate a criminal charge is not affected by an order from the president directing the United States District Attorney not to prosecute.[4]

Much difference of opinion exists as to the general inquisitorial power possessed by a grand jury. The early English writers generally attribute very extensive inquisitorial powers and the opinions of the seventeenth century bristle with evidence of such power.[5] We have positive authority for it, in this country,[6] also against it.[7] In the former case it was held that the grand jury have "plenary inquisitorial powers and may lawfully, upon their own motion, originate charges against offenders and that it is immaterial how the information upon which they acted was brought to their attention." In the latter case one of their number charged certain public officials with misappropriation

Reference are on next page.

of public funds. They invoked the power of the court to compel the attendance of certain witnesses and the production of certain written evidence. The request was denied. The only justification that the court gave for its decision, and this was sustained by the highest court in the state, - was that the grand jury had no authority to investigate or indict until some person had made a complaint before a magistrate and thus brought the matter before the court. In the federal practice it has been decided that the grand jury has no general inquisitorial power tp ~~inquire~~ inspect the books of federal officials and to subject the officers themselves to examination in respect to the entries in those books, for the purpose of ascertaining whether or not there has been misconduct in any public office . The obiter dicta in the case is to an effect that this right may be vested in the body by statute, but, unless specifically authorized, it does not exist.[8]

1.Bishop--Crim.Law Procedure,3rd.Edition,-Sec.239.
2.People vs. Molineaux,26 Misc.(N.Y.),589.
3.Fed.Cases,No.18,255.
4.In re Miller,-Fed.Cases,No.9552.
7.Lloyd vs.Carpenter,3 Clark (Penn.),-188.
5.See Thompson & Merriam--Juries-- 671-72.
6.Exparte Brown,72 Mo.,-83.
8.30 Fed.Cases,No.18255.

The safe assumption seems to be that the grand jury has inquisitorial powers to a limited extent only. These extend over certain cases of violation of the liquor laws and like offenses, and such other inquisitional powers as may specifically be granted by statute. Otherwise the investigations of a grand jury are limited to such cases as may come before them in any one or more of the four ways indicated.

It is the common practice today to permit the district attorney to attend the sessions of the grand jury. It does not seem to have been a common law right with the counsel for the crown. After the Shaftesbury case the principle was established of hearing the evidence in secret and this was understood to mean that the state's counsel need not be admitted to the hearings. Today, though, the laws of the federal government and of practically all the states assign the prosecuting attorney such functions in connection with grand jury proceedings that his presence is required. Therefore he does not have to beg the permission of the jury to attend the sessions, but goes there as a matter of right and duty. He goes there as their legal adviser to a certain degree. He draws up indictments, summons witnesses, examines them before the body and in general aids them to perform their duties.

It is not however, his business to try to influence the findings of a grand jury. The jury alone should consider the evidence and apply it to the case at hand. It is not his part to give effect to the evidence adduced altho he may ad-

vise as to the legal requirements. In case he does say or do something that is impertinent but which does not prejudice the case of the accused, our federal courts will regard the act as a mere irregularity and will not on that ground quash an indictment.[1] This is the sensible rule and is followed by many states. The stricter rule however, has the advantages of not erring on the side of abuse of the priviledge. The rule which forbids him to become an advocate before the jury should be rather closely adhered to.

This question directly involves the wisdom of permitting the attorney to be present in the jury room during the deliberations. In some jurisdictions he may be present but cannot claim the right to be in the room during the discussion of the case.[2] In others the presence of the prosecutor would destroy the secrecy of the deliberations and therefore the indictment could be quashed. This seems the better practice. It gives the grand jury perfect freedom of action. Cases can be imagined where the presence of the prosecutor would tend to intimidate the members and prevent them from giving a perfectly candid expression to their convictions. The rule which absolutely requires the prosecutor to withdraw during deliberations on a certain case tends to restrict this officer to his proper sphere as an attendant and servant of the jury and not as the ruler of it.

This latter practice is usually required by statute, thus removing all doubt as to the common law rights. Prosecutors ordinarily exercise great care to get out of the room before the jury deliberates upon the decision and have witnesses to testify to the fact, for otherwise their indictments may be quashed.

In Minnesota the Attorney General may be requested by the governor to present a case or his assistance may be

1. King's Case, 1 Conn., 428.
2. U.S. vs. Terry, 39 Fed. Rep., --355.

requested by the county attorney of any county.[1]

Under this power it has been held that either he or his assistants may appear before a grand jury in presenting any case.[2] His powers seem to be rather extensive for the court said: "The Attorney General, as the chief law officer of the state, possesses and may exercise, in addition to the authority expressly conferred by statute, all common law powers incident to and inherent in the office."

In addition to the prosecuting attorneys, other persons are sometimes empowered by statute to take matters before the grand jury. An example of this practice is found in the statutes of Minnesota providing for county examiners in certain counties.[3] The examiner is empowered in these words: "It shall be the duty of any examiner appointed under this act, upon the discovery by him of any act or practice on the part of any public officer or body of officers of any township, villiage, city, school district, or charitable or benevolent institutions maintained or sustained wholly or partly by public contributions, in this county, which is criminal in its nature, to report the same to the grand jury of his county at their session next following any such discovery, together with all data obtained by him with reference thereto and the names of any and all persons cognizant of any parts pertinent thereto. It is hereby made the duty of any and all persons having in their possession books, papers, documents or other material which in the opinion of the examiner should be presented to such grand jury, to furnish and entrust the same to the said examiner for such purpose." Such acts give officials of that nature a very considerable and direct power to take their cases into court. At the same time such examiners relieve the grand jury of a great

2. State ex.rel.Young vs.Robinson,101 Minn.--277.
3. Laws of 1909--Ch.108.
4. Laws of 1905----------Ch.277.

deal of this supervising work. It seems a very desirable addition to the prosecuting force both because it works for efficiency and because it relieves overworked juries of a considerable amount of routine work of which they have no expert knowledge.

Another power of the grand jury, that power which gives it its distinctive character, is the right to file indictments and make presentments.

These are the means by which the body brings offenders before the court for prosecution. The two terms are variously defined. The statutes of Minnesota[1] define an indictment as "an accusation in writing presented by a grand jury to a competent court, charging a person with a public offense;" and a presentment as "an informal statement in writing by a grand jury, representing to the court that a public offense has been committed, and that there is reasonable ground for believing that a particular individual, named or described, has committed it." These definitions are typical and express the nature of each, and the distinction between them. The presentment is based upon the personal knowledge and observation of the grand jury and is generally regarded in the light of instructions upon which an indictment may be framed. The presentment is rarely used in practice. In the Hennepin County Court of Minnesota it has never been used, at least "the memory of man runneth not to the contrary."[2] This experience is borne out in the decisions of other jurisdictions. "In Florida presentment in the technical sense, although not prohibited by the constitution; is unknown to the practice of the state."[3] "This form of accusation

1. Revised Laws of 1905, Sec. 5278.
2. Interview with Hugh Allen, Clerk of Court.
3. Collins vs. State, -13 Fla., 651.

(presentment) has fallen into disuse since the practice has prevailed---and the practice now prevails generally---for the prosecuting officer to attend the grand jury and advise them in their investigations."[1]

In several instances presentment has been abolished or its original character has been changed. Georgia has by law abolished the distinction between indictment and presentment.[2] California has abolished presentment by its constitution[3], and no person can be arrested on a presentment.[4] Oregon has changed the nature of it in these words: "A presentment is a mere informal statement of facts for the purpose of obtaining advise of the court as to the law arising thereon. It is not filed in court or preserved beyond the sitting thereof.[5]

In the light of these experiences and laws it may fairly be concluded that presentment is passing out of use. In its original nature it can serve no useful purpose. If the evidence is sufficient, the better practice is to indict under all circumstances. If the evidence is not sufficient to warrant an indictment, it is useless to burden the court and the prosecuting attorney with a lot of presentments. It is not worth their time considering them. The only justification that may be claimed for its retention is that it gives, in the absence of statutes, a common law right to file the so-called reports of grand

1.30 Fed.Cases,-No.18,255.
2.Code of Ga.,1895--Vol.3:836.
3.Const.,1879.
4.In re Grosbois 109 Cal.,445.
5.Codes and Statutes of Oregon--Sec.1258.

juries. It has been held that any final finding may be called a presentment,and is not improper because an indictment cannot or does not follow it.[1]

The grand jury's relation to the evidence and witnesses may now be considered. The evidence that may be received by a grand jury consists of such as is given by witnesses produced and sworn before them;and legal,documentary,or written evidence. They should receive none "but legal evidence,and the best in degree to the exclusion of hearsay or secondary evidence,except when such evidence would be admissible on the trial of the accused for the offense charged".[2] It is the prosecuting attorney's business and duty to advise as to the legality of the evidence.[3] The accidental admission of hearsay or irrelevant evidence is not generally a sufficient ground for quashing an indictment,[4] and the illegality of the evidence cannot be shown by the affidavit of a juror.[5]

There is no right and obligation to receive any evidence for the defendant.[6] To do this would be to try the case. If they are not satisfied that the evidence before them is sufficient to warrant an indictment and know or have reason to believe that other evidence exists,they should ask that these witnesses be summoned before them.

1.In re Jones,92 N.Y.-275.
2.Revised Laws of Minnesota,1905--Sec.5280.
3.1 Whart. Cr.Law--Sec.493.
4.U.S. vs.Jones,69 Fed.Rep.,973.
5.State vs.Reebe,17 Minn.,-241.
6.1 Chitty Cr.Law,-317.

The laws of Minnesota seem to give a limited right to summon witnesses for the defense,for they say:"If,in weighing the evidence submitted to them,they have reason to believe that other evidence within their reach will explain away the charge,they shall order such evidence produced."[1]

The general rule as to the nature and amount of the evidence which is sufficient to warrant a grand jury in finding an indictment is this,that it must be legal,prima facie evidence of guilt;that is,it must be of such a nature that,if it stood alone,uncontradicted by any defensive matter,it would be sufficient to justify a conviction on trial.

The power to summon witnesses rests with the court primarily. Usually the power is likewise delegated by statute to the prosecuting attorney. Such power in the grand jury was unknown to the common law and,in the absence of a statute,any proceedings on such a basis are void.[2] Where the grand jury is vested by statute with broad inquisitorial powers it often follows that they,in those cases,have the right to summon witnesses.[3]

1.Revised Laws of 1905,Sec.5280.
2.State vs.Lewis,--87 Tenn.,119.
3.State vs.Smith,--19 Tenn.,99.

The method of swearing witnesses varies. Under the English practice they are sworn in open court and then sent in the grand jury room.[1] This was probably the early practice in this country also. At the present time the witnesses are usually sworn in the grand jury room by the foreman, the prosecuting attorney, any justice upon the jury, or a member therof as the statute may provide. Such provisions are usually not exclusive and swearing in open court may still be used.[2]

The liability of a witness must be considered as criminal and civil. In the former they are generally liable. They are sworn to tell the truth and may be prosecuted on a criminal action for any wilful and deliberate violation of that obligation.[3] The same grand jury before which the witness testifies may indict him for any perjury that he may have committed before them, but such an indictment may be quashed providing the person testified in a case in which he himself was being investigated, that is, if the perjury is committed in giving evidence against himself. Two such cases were found under the indictments of the November, 1910, grand jury of Hennepin Co., Minnesota.

Civilly, a witness before a grand jury cannot be held liable. An interesting illustrative case grew out of some graft cases investigated by a grand jury in Milwaukee.[4] The testimony given by a witness charging a person with extortion and bribery was used as the foundation of a civil action for slander. The indictment alleged a specific statement based on the evidence of this witness which was slanderous per see, if not true. It was however, held that all words or statements pertinent to and material to the inquiry made before a grand jury and the district attorney, are made in the course of a judicial proceeding and therfore are priviledged. They cannot be used to file a complaint for slander.

1.1 Chitty Cr.Law,321. 2.State vs.Allen,85 N.C.,680.
3.People vs.Northey,77 Col.,620. 4.Schultz vs.Strauss,106 N.W.Rep.1066.

The persons called upon to testify before a grand jury should be competent witnesses. It is a well established rule that no defendant can be compelled to testify against himself,[1] altho an indictment will not be quashed if the accused voluntarily testifies.[2] Many states have statutory provisions under which a person convicted of certain crimes is incompetent as a witness. Generally the fact that a witness is interested in the prosecution will not be a ground for quashing an indictment.[3] If, however, the indictment is founded upon the evidence of a single incompetent witness or when it is founded upon the testimony of both competent and incompetent witnesses, the indictment will usually be quashed.[4] It is held to be impossible to say what effect the incompetent evidence may have had in favor of the indictment. It may have furnished the decisive argument.

The power and independence of the grand jury naturally lead one to ask whether the jurors themselves are liable for their acts and to what extent. One can readily see that a grand jury can wield its tremendous power so as to do a deliberate injury to an innocent. That power may be used as a means of oppression. It is but natural to look for some remedy to hold a faithless juror to account, to give expression to the maxim that "for every wrong there ought to be a remedy;" but such wrongs are generally without a remedy.

In discussing the liabilities of a grand juror two classes of liability should be distinguished, civil and criminal. Only by so doing can any definite conclusions be reached. The common law presumed every grand juror to be indifferent when he was sworn to serve the king, and it will not admit proof against this

1.State vs.Gardner,-88 Minn.,130.
2.State vs.Froiseth,16 Minn.,296.
3.State vs. Fellows,2 Hayw.--(N.C.)--340.
4.People vs.Price,2 N.Y.Sup.414.

References are on the next page.

assumption.[1] This insures him against civil liability. The rule is recognized both under statute and apart from statute, that, during the whole of their proceedings, the grand jurors are protected and that a person cannot be held to answer in an action for malicious prosecution for what he has said or done, as a member of the grand jury, however, malicious or destitute of probable foundation his action may have been. There is, therefore, no civil responsibility, and this rule is founded on sound considerations of public policy. Were a grand juror in danger of being answerable to a defendant for his official acts, it might lead to a great deal of malicious prosecution on the part of defendants, thus making jurors unnecessarily conservative, and introducing an evil into our society greater than the first. With a healthy public opinion in the community there is little to fear from a malicious grand jury. Such a body simply will not be chosen.

But grand jurors owe responsibility to the state. Criminally they may be proceded against either for contempt or by indictment, for a grand jury has authority over its own members to indict any one for violations of the laws of this state, one of which is the oath under which he acts. Intoxication during sitting constitutes contempt, if wilful.[2] Disclosure of secrets to one indicted and under various other conditions constitutes contempt and this even after the grand juror has been discharged. His obligation of secrecy continues, and his disclosure to a counsel for a person indicted by the evidence upon which the indictment was found constitutes contempt regardless of the purpose for which the disclosure was made.[3] Even a failure to make complaint of a crime known to the juror is a criminal neglect

of duty. Such non-feasance usually receives a liberal construction in favor of the person accused in order that a person who acts in good faith and in the honest belief that the offence was not of sufficient magnitude to justify a prosecution, may not be liable for the penalty.[4]

Certain limitations should be noticed to the oath of secrecy.[5] The general rule governing this question is that a grand juror will be permitted to testify in regard to all matters except those which would indicate or reveal how a member voted.[6] Nothing must destroy the secrecy of action of these members. A grand juror cannot testify to facts that would impeach the finding of the grand jury. As a few illustrative cases under which a grand juror may testify these are given: who was the prosecutor upon a certain bill of indictment;[7] that twelve jurors concured in the finding;[8] that a witness had testified to a different state of facts before the grand jury;[9] that for the protection of public or private rights, any person may disclose what transpired before a grand jury.[10] These same rules apply to the clerk if he is not one of their number and to the prosecuting attorney.[11] The rule may be said to be that the testimony given before a grand jury is not of such a secret nature that it can not be called upon to testify whenever the reason for the secrecy ceases to exist.

1.1 Chitty Cr.Law,323
2.Com.vs.Keffer Add.(Pa),290
3.In re Attwell,140 Fed.Rep.,368.
4.Watson vs.Hall,46 Com.,204.
5.For a careful discussion see'Grand Jurors as Witnesses'by M.W. Hopkins,21 Crim.Law Jo.,104.
6.State vs.Beebe,17 Minn.,241.
7.Huidekoper vs.Cotton,3 Watts(Pa.),56.
8.1 Greenleaf on Evidence,Sec.252.
9.Com.vs.Mead,12 Gray(Mass.-,167.
10.U.S.vs.Farrington,5 Fed.Rep.,343.
11.1 Greenleaf on Evidence,Sec. 252.

When the grand jurors have completed all the work which has fallen to them, they prepare a written report of their investigations which is signed by their foreman. In this report they frequently take occasion to discuss various matters affecting the public welfare, criticise public officials, act as censors of the community, suggest changes in public administration and discuss such other affairs of public interest as they see fit. The right to make these reports is sometimes challenged on the ground that it is an exercise of power out-side of the jurisdiction of a grand jury. It is claimed that it is an exercise of power without their official duty as accusers.

Such an attitude has no historical basis. From what has already been said about the grand jury, it is evident that it had extensive powers from the time of its birth. Blackstone tells us that the grand jurors are summoned "to inquire, present, do and execute all those things which on the part of the Lord the King shall then and there be commanded them to do."[1] They are not summoned simply to find indictments but to "do and execute all those things" which may be given them in charge. About the same time Lord Mansfield made no objections to the right of the grand jury of Middlesex to present an address to His Majesty.[2] It was a distinct recognition, without any disapprobation, by one of the greatest constitutional lawyers in English history, that the grand jury had other functions than that of finding indictments. These opinions teach us that the grand jury was to inquire into whatever concerned the peace and order of the Kingdom and could make a report to the court of what in their judgement, the peace and order of the kingdom required.

1. 4 Commentaries, 302.
2. 2 Burrows Reports, 1088.

The effect of statutes in this matter instead of repealing common law powers are simply in aid of it. The settled rule of construction is that statutes, unless by express provision they are made exclusive, do not abrogate the other common law powers of a grand jury. The legislature in re-enacting certain provision of the common law, does not deprive the grand jury of other functions under the common law. Therefore, unless there is an express provision against this right to make reports, it will exist and that in the absence of statutory authorization.

The assistance of outside counsel may be asked to draw up a report by a grand jury, including indictments. Such action will not invalidate the proceedings providing the attorney was not present at their deliberations and, did not in any way influence their proceedings.[1]

The reports are filed with the clerk of the court, and are also usually given for publication. There seems to be some doubt as to whether a judge need permit a report to be given for publication, but the better practice is to do so. If this is not done some artful device may be resorted to in order that the end may be accomplished. In an investigation into election frauds in Richmond, Virginia in 1905, the grand jury offered two reports, a majority report and a minority report. The court refused to accept the latter and ordered the jurors not to make

1. State vs. Harris, 39 La., 428.

it public,although it seems that justice was allied with the minority.[1] In doing so the judge recognized the report of the same legal rank as an indictment. Whatever is found by the quorum prevails. If the grand jury were a mere investigating committee it would be perfectly proper for the minority to submit a report.

At least two states,Georgia[2] and Wyoming,[3] have made legal provision for the publication of the grand jury report in the official paper of the county at public expense. When one considers the eagerness with which most papers seek the report as matter for a news item, such a provision hardly seems necessary. Only in case of conspiracy to suppres certain revelations would there be any advantage in such publication. Misinterpretation of the report by the press could be remedied by requiring papers generally to stick to accuracy and truth in reporting court proceedings. As in all other court proceedings,they should not be permitted to anticipate the report. Some very insidious libels may be committed by a paper in suggesting in advance the contents of a report,which never appear in the final report.

One argument advanced against permitting reports to be made is that the practice licenses grand jurors to libel citizens. This,however,will hardly merit serious consideration. It begs the whole question. By the same logic

1.W.L.Royall--Va.L.Reg.,9:543-47.
2.Code of Ga.,1895--Vol.3,840.
3.Revised Statutes,1891,Sec.5299.

grand jurors should not be permitted to file indictments, for a false indictment equally libels the person affected. The jurors are sworn to a duty and the state may hold them to their task. There can be no serious danger to citizens from this source. The function of the grand jury is to pry into everything that concerns the public safety and morals. It should have some way of informing the court and the public, in case the limitations of the law will not permit an indictment; that somebody or some group of people are not playing the game of life fairly and squarely, but in doing this a report should carefully avoid all political ends. There is some danger that reports might be used to influence some public policy. The grand jury's one aim should be a non-partizan exposition of facts in the interest of justice.[1]

1. As an illustration of the misleading fashion in which Mr. Edwards, in his book on Grand Juries, treats some of his topics, his description of the unprivileged character of the reports of grand juries (pp. 158-59) may be cited. He bases his discussion on Rector vs. Smith, 11 Iowa: 302. It is true that the Supreme Court there sustained the lower court in the decision that a report is not a privileged communication, but in the next breath it declares that an action for libel will not lie because the report was made in good faith, without malice and with the belief that it was made in the discharge of duty. The two parts of the decision cannot logically stand. If the communication is not privileged how can it stand in the face of statements in it that are libellous per se? It is a flat contradiction of principles. And, furthermore, the first part of the decision is contrary to the well-established rules regarding the privileged character of these reports. It must be looked upon as an erratic bit of discord that has crept into a long line of uniform decisions through the opinion of one court for reasons best known to those judges, and Mr. Edwards does his readers an injustice by using it as he does.

As a final consideration it seems desirable to know what are the relations and liabilities of outside parties who attempt to influence the findings of a grand jury. As a general proposition it is unlawful for anyone to attempt in any manner to influence the action of a grand jury. It is improper to send communications to them. No individual has a right to instruct a grand jury respecting anything. If he has any matter that ought to go before the grand jury, he should present it to the court. But while the above is the safe rule the tendency seems to be not to punish a person unless he has a vicious motive back of his action. Thus where an unauthorized person had sent a postal card to the members of the grand jury to request them to call at his office and, upon the call, requested them to make certain investigations in a case to be heard before them, it was not held contempt in New York, although the court did pronounce it "reprehensible."[1] In another case it was held that to render such proceedings a contempt it must involve some contemptuous behavior at least "tending to impair the respect due to the court",[2] a very slippery clause as a rule of law. These cases about sum up the decisions as they exist respecting the conditions under which unauthorized influence with the work of a grand jury does not constitute contempt. They make a mild departure from the strict rule of the common law in favor of the person with good motives. It remains to be seen whether, apart from statutory provisions, the other states will adhere to the old rule or follow the practice of the

1. People vs. Sellick, 4 N.Y.Cr.--529.
2. Bergh's Case, 16 Abb.Pr.N.S., 266.

New York courts.

Some states and the federal government have statutes specifically governing such cases. The laws of the latter provide for the punishment of persons who "corruptly, or by threats or force, or by threatening letters ----- endeavors to impede any grand or petit juror of any court of the United States in the discharge of his duty." It provides a milder penalty for those that attempt to influence the action of a grand jury but do not do so corruptly or by threats, force, etc., and also provides for heavy penalties in case of conspiracies to influence, corrupt or intimidate a grand jury.[1] This seems like a very sensible schedule for punishing all interference with the free action of a grand jury. It prohibits all kinds of influence but takes recognition of the degrees of contempt.

1. U.S. Compiled Statutes, 1901, Sec. 5404-5406.

CHAPTER V.

SUMMARY AND CONCLUSIONS.

The work of this thesis has ,in the main,been introductory to a final and larger study of the grand jury as an institution for use in the administration of criminal justice. In order to understand the position which the grand jury holds among English speaking people it has seemed absolutely essential to study it as an historical product. Many of its attributes seem absolutely absurd when tested by reasoning based upon twentieth century experience. Such a survey accounts for the peculiar sentiment that prevails towards the institution among a large number of people.

Next it has seemed of some interest to discover just what use has been made of the grand jury in American jurisprudence and show its present status in the different jurisdictions of the United States. This study discloses an historical development here as well as in the county of its origin. Particularly worthy of note is the present tendency more and more to discard its compulsory use and substitute therefor prosecution upon information. This fact contains in itself a fertile field for investigation to a complete understanding of the institution with which we are concerned.

To more fully appreciate the problems involved in working this piece of legal machinery some space has been given to the matter of selecting and organizing a grand jury. The significant thing about this in American practice is the diversity of usages most of which can be traced to a common source in English law. This unlikeness in practice makes it exceedingly difficult to make generalizations which will be warranted by facts. The rules in these matters are generally rather flexible, and do not require that strict adherence to preciseness that law ordinarily demands. An action by a grand jury is not a final adjudication of a case, but simply a preliminary procedure upon which subsequent action is to follow. For that reason it is not necessary to adhere exactly to minute details of rules. It is better to proceed with the trial and definitely test the merits of an indictment than to delay action by a mere wrangle over technicalities. If the substantial rights of an accused are not violated he has no grounds for complaint.

The big problem involved in this consideration is how to select the right kind of jurors. American experience seems to justify a departure from the English in this regard and place this function in some other authority than the sheriff. The judges of the court, the

county commissioners,or specially created jury commissioners are the usual persons empowered with this duty. The kind of men that are selected decide whether the institution is worthy of respect or not. It is the old,ever-recurring problem from which students of government cannot escape,-institutions must be run by men,and men make or unmake them. Whatever authority selects the persons for this very important work,must have such a determined public sentiment to spur it on to make good choices,and such sympathetic and appreciative approval when that it is done,that they will not dare to do otherwise. The public in this respect must realize,as the physicist in his sphere,that a stream cannot rise higher than its source.

To aid the powers that make the selections,some of the most evident disqualifications might clearly be provided for in the statutes. For the convenience of the individuals and the public certain professions and occupations should be exempted from service,but the selection should be made with reason and discrimination. The grounds for challenges should be rather limited,for with the other safeguards about the whole procedure it seems that few absolutely disqualified persons will get on in any circumstance. Irregularity in the selection and organization of the body should usually furnish a ground for a challenge,

unless it is evident that the irregularity was simply an unintentional and harmless error. It seems that a limited right of challenge should also rest with the government, since that is most directly concerned in the enforcement of law. The original reason for denying this privilege,--namely, to prevent the state from packing a jury to get indictments for persecution--no longer exists.

Finally, the big question of the powers, duties, and obligations of grand jurors has been considered. The broad scope of power under the common law has been somewhat curtailed by statutes and decisions in many jurisdictions, but, apart from specific limitations, the grand juries still have the right and power to investigate into all conditions which affect the morals and safety of the community, and report thereon. They are somewhat limited by the rules of evidence, only legal evidence being usually permissible; their inquisitorial powers are likewise restricted in many fields, but these restrictions are not as imperative as in regular court proceedings,--and it is just that they should not be. Again it should be remembered that a grand jury does not make final disposition of the matter. The jurors are not interested so much in fine shades

and distinctions in evidence as they are in the effect which a given report has upon a sensible mind as to the moral certainty of a prima facie case. They are not to try the case,but submit it to trial if plausible evidence gives a reasonable probability of guilt.

The effectiveness of the work of a grand jury would be very much greater if it had an independent fund upon which it could draw in making investigations. This question is worthy of much consideration especially in our large cities. It has been repeatedly emphasized that a grand jury in these days of large urban cities must depend very largely on outside information for their work. Their own knowledge is comparatively limited and of too vague and general a nature for use in bringing indictments. Ordinarily they must depend upon the evidence produced by the prosecuting attorney's force. In making certain investigations the jurors divide themselves into small committees,each to study some particular evil. But,after all,most grand jurors have not the time or the training to make a really searching investigation of such crimes as gambling,social vice,violation of liquor laws,etc. To do this work requires experts,that is, detectives.

As an illustration of the need of such a fund and the use that could be made of it,the Hennepin County grand jury of the March term,1911,might be cited. It made a particular

investigation of the gambling evil by employing detective service. The funds for this work were taken from the contingent fund of the county attorney's office, and some possibly came from private sources. As a result of this work several of the most notorious operators of gambling dens were indicted and a report was made on 578 places that were found operating gambling machines.[1] The evidence collected was conclusive. The operators of these machines all over the city became alarmed. The mayor was summoned before the jury and there made promises to take special pains to see that the laws and ordinances against this evil be enforced.

Such instances could be multiplied many times, if the work could be done thoroughly. A superficial investigation of such conditions with insufficient evidence to warrant filing indictments, or, if they are filed, later to be nolled or fail of conviction, breeds a certain spirit of defiance and self-security in this element; but the collection of incontrovertible facts spreads terror and dismay into their ranks. With a reasonable independent fund at their disposal, the effectiveness of the grand jury could be multiplied many times. It could become a most potent force for law enforcement; a citizens' committee, with power to subpoena witnesses, might be almost wholesome body to supervise, or rather insure, the impartial and fuller administration of our criminal laws.

And this work is not confined to discovering these flagrant

1. Report of the Grand Jury--Apr. 28, 1911.

vices only; this same jury employed an engineer to assist them in making their investigations and report on the ventilating conditions at the court-house. The field for such use is large. Upon such investigations the reports of grand juries take on more of an authoritative character, something worthy of serious consideration, something upon which action may follow. Only when the reports take on this respectable character do they deserve to be ranked as privileged communications.

This same jury recommended "to the board of county commissioners and the board of tax levy an appropriation of not less than $5,000.00 per annum to be at the disposal of the grand jury and the county attorney, jointly, subject to the approval of the court, for use as a special fund in the detection of crime and the securing of evidence to convict." A bill for a similar purpose was introduced at the 1911 session of the legislature of Minnesota, but unfortunately failed to become law. These efforts seem to result from a real want and are worthy of adoption.

After a summary of these investigations the question which naturally occurs to the reflective and speculative mind is what of the value and future of the grand jury? There has not been sufficient investigation into the workings of the institution to warrant any positive conclusions. Just common sense, or reason, and a study of this jury as it is reflected in statutes

and court decisions,furnish grounds for some interesting and perfectly logical systems of speculation; but,on the other hand,students of political science have had enough experience to know that even in the affairs of government things are not always what they seem;they must be assayed and tested in the laboratory before their real value can be given. So it is with the grand jury;a careful field study of its own working in actual administration,and,likewise,of its substitutes, must be made before any valuable suggestions as to its ultimate merits can be given.

The argument based upon the antiquity of the grand jury should at once be discarded;likewise all talk of ancient bulwarks,palladiums and safeguards should be eliminated as positive argument for the system under existing conditions. These are arguments which would sustain a body of hereditary legislators in Great Britain with its bench of bishops,or an inflexible party allegiance in the United States. Such arguments have proved the main support of many old abuses in every shape or form. They may be discarded as being obsolete, and the matter should studied, without prejudice,from the standpoint of modern needs.

But,while these facts have no place as positive argument,they do deserve serious consideration. They suggest that a change be carefully weighed. Even the most enthusiastic reformer respects this past service and goes slower lest he

should fly to greater ills. A change seems,however,to be coming on. Arguments are advanced for and against the system. This discussion is a healthful sign. It would be unfortunate if an institution which is as old as Anglo-saxon civilization could be wiped out without causing the slightest ripple on the public mind. Its merits and demerits should be carefully weighed and considered in the light of their substitutes. If the institution is worn out it should be discarded;if it is too valuable a heritage it should be preserved;if it requires modification it should be changed to meet the present day needs.

In all discussions the question should be asked whether the evils complained of are inherent in the system or only an abuse of the system. The question in its last analysis resolves itself into a consideration of the fundamental principle underlying such a legal procedure.

A person imbued with the modern sense of efficiency and simplicity would consider the grand jury a clumsy,awkward piece of machinery as much out of place in a twentieth century society as a wooden plow would be in the wheat fields of the West. This view has some real merits,but in dealing with public institutions the attitude of the public must always be considered. It is important that,especially in such an important matter as the administration of criminal law,a system be used which inspires public confidence. Among a large

number of people the grand jury does just this.If the system has inherent weaknesses the public should be educated to them before radical changes are adopted,for the experience of the past indicates that no artificial institution which is not deep-rooted in public confidence can thrive.

Experience seems to warrant a considerable change in grand jury practice. There is no sound argument to-day for bothering such a group of men with the jail cases and all cases that have been committed be a magistrate. The procedure in these cases to-day is this:-

1.Hearing of both sides before a magistrate, unless it is waived by the accused.

2.Hearing of one side before the grand jury.

3.Hearing of both sides before the judge and petit jury.

What useful purpose can be served by the second step? It does not protect the individual from shame or imprisonment. If the intervention of the grand jury saves one from the third step by throwing out the bill of indictment,no one knows how it was done. There has been no public hearing at which the individual has been vindicated and the next body may still indict him on the same charges.

In addition to serving no useful purpose to the individuals in question this procedure means an unnecessary expense to the public. The prosecutor,witnesses,solicitors,

and jurors must be paid for all this work. In no sense do the jurors,as was the original purpose,acquaint the court with the crimes of the district. It is somewhat absurd to have the grand jury present to the court that a crime has been committed,when the court already knows about it and the jurors have nothing but an ex parte statement upon which to base their decision. The jurors themselves usually find these cases an uninteresting burden. Indictments are rushed through simply to get the cases out of the way. All told this practice seems antiquated,and further on suggestions will be made to remedy this defect.

As to the other work of the grand jury it may be equally positively stated that much of the local administrative work that has clung to it in some sections has no place in its functions. That can best be done by regularly employed experts.

Few would however go so far as to absolutely abolish the institution or someyhing analogous to it. One field it has preempted and that is its supervisory duties over the morals of the community. For this work,properly clothed with power,it is an excellent system. Nothing can do more to uproot vice,corruption,graft,lax enforcement of law and other great public evils,than a body of respected citizens who go about their work fearlessly and have the legal power to probe into conditions. It removes the charge of

politics which might attend such action by an individual. Famous graft prosecutors would have been seriously handicapped in many instances if not for the existence and assistance of a grand jury.[1] A courageous prosecuting attorney, backed by an equally courageous grand jury becomes an irresistable force for decency and honesty. This action has an accumulative effect in arousing public sentiment to the enormity of the crime and wins support more readily. The grand jury acts as an intermediary between the public and its enemies and as such it commands continued respect. It opens one channel for genuine public-spirited service.

The information is the substitute that is being used instead of the indictment to bring those offenders to trial that have been bound over by a magistrate or municipal court. The procedure is simple:

1. Every binding over is certified by the magistrate to the district attorney.

2. The district attorney is required within a certain period, usually 30 days, to draw up an indictment just as he does now and have that filed as an information. This is the commonwealth's statement of the charge and corresponds to a plaintiff's statement of claims in a civil action.

3. This information is treated as an indictment in all future action.

1. Outlook, 75:329-30

4.In the event that the district attorney is convinced that no case can be made out against the person bound over,he is given the right to state the matter to the court with reasons for not filing an information. The court may then excuse the accused or still order the district attorney to prosecute.

Under such a ystem the rights of the individual are not unnecessarily restricted. He still enjoys the following protection:

1.A public hearing before a magistrate with evidence on both sides,in other words an opportunity to clear himself.

2.Presumption of innocence until he is proved guilty.

3.Every reasonable doubt is resolved in his favor.

4.The legality of every commitment can be inquired into at the request of any defendant by means of a writ of habeas corpus.

5.He may have an attorney to defend his case in a trial by jury.

With such safeguards about the defendant on every part of his course,he can hardly claim,legitimately,that his rights are not properly protected by this slight change in procedure

The significance of the change is still more emphasized by the fact that in most of these cases it already is,for all practical purposes,within the power of the district attorney to determine whether an indict-

ment shall be filed or not. He prepares the evidence that is to go before the jury,conducts most of the examination, and advises as to the law. The grand jurors are mere putty in his hands to mould as he wills. As the system stands it simply shields him from responsibility.

The power of a grand jury to probe into every crime should in no wise be limited,even with the addition of the information in all cases in criminal procedure. The purpose of the latter process is simply to expedite and simplify the administration of the criminal law rather than restrict the powers of the grand jury as an institution. When once the grand jury is called into existence,it has all the powers that inhere in it under the old common law. In this way a valuable check will be had on the work of the ditrict attorney. He knows that at any time his record and the conditions of crime in the community may be reviewed by an authoritative body of citizens from his costituency. Such an additional sense of responsibility ought to spur on these officers to a faithful performance of duty. It is,perhaps,as efficient a check as can exist, besides the power to call in,at any time, the attorney general of the state to supersede the former when conditions warrant the interference.

The methods employed to call the grand jury into existence have already been indicated.[1] Under most circumstances,in view of what has been said throughout the dis-

1.Chap.II.

cussion,it hardly seems necessary to require the body to meet at regular intervals,as,for instance,once a year.[1] The North Dakota system seems to make ample provision for calling the body into existence. It provides that a grand jury may be impaneled:

1.At the discretion of the district judge.

2.At the request of the board of county commissioners.

3. Upon a petition signed by at least 10% of the total male vote cast for the office of governor at the last preceding general election.

A question may be raised as to what should be the size of the grand jury that is used under such conditions. No presentation has appeared discussing the relative merits of a large or small grand jury. Does it not,however, seem reasonable that a body of this nature and used for the purposes that have been indicated ought to be of considerable size? It does not necessarily have to consist of twenty-three men,for there is no particualr virtue in that number,but is a jury of as few men as six an effective force? Would the charges of personal interest in the results,political motives in the recommendations,influence brought to bear upon them,be more apt to be made against a larger number of them? In other words which would inspire the greatest public confidence and which would do the more effective work? This problem remains to be marked out.

If any particualar prima facie case can be made against

1.California.

the scheme as outlined,it consists in the fact that the the office of prosecuting attorney has become very much demoralized in many sections of the country. It has become a mere political affair in many places. Usually the younger and less experienced members of the bar,often incompetent,ignorant of law and procedure,or even dishonest, are elected to this office,with the result that the place has become a kind of experiment station in the law. It may be replied,however,that probably the best way to eliminate such evils is to make the position one of such responsibility that the people will not dare to fill the office with incompetents. Furthermore,the change will only emphasize the more the power that actually lodges in that office, even under the old system. It has been pointed out that really the change would not materially influence the power of the attorney but simply bring to light the power now obscured by the grand jury.

Such being the plan,suggested,it may be well to quote what has been officially said concerning the way it works. These extracts are taken from the messages of governors; others could not be found. As to the benefits of the system,Governor Chamberlain of Oregon said:"The act of 1899, empowering the several district attorneys of the state to file original informations against those charged with crime has resulted in a great saving to the taxpayers. The courts are still invested with a discretion to impanel grand juries,if they see fit. But,as a rule,there is little for them

to do,except to visit and inspect the public institutions of the counties,cities,and state!"[1] Opposed to this stand the words of Governor McDonald of Colorado: "I believe the grand jury should be rehabiliatted in Colorado. While it is true that a judge can call a grand jury together when he deems it necessary,still it seems to be equally true that whenever a grand jury is called it is for political purposes only,and not for the purpose of getting at the real truth of existing conditions!"[2] But that the reader may not at once become too enthusiastic for the older system these words from Governor Blanchard of Louisiana may be quoted:"If grand juries will not do their duties,the power ought to be lodged somewhere to bring the accused bfore the bar for trial. I would say lodge it in the governor. Give him,in extreme cases where the grand jury refuses to indict,the authority to direct the attorney-general to file on behalf of the state a bill of information charging the offense!"[3] In view of these statements,does not the question after all resolve itself into the problem of getting the right men to run the system,whatever it be?

If such is the case why not simplify the criminal procedure as much as possible? We have fallen farthest short of ideal conditions in our government in the failure

1.N.Y.State Library Leg.Bul.,1903--Sec.217.
2.Ibid---1907--Sec.213.
3.Ibid---1908--Sec.212.

to secure expedition and thoroughness in the enforcement of public and private rights in our courts. Our judges are not necessarily lacking in either honesty, industry or knowledge of the law. The whole judicial machinery is too cumbersome. The grand jury is part of this unnecessary weight. The use of the information is a long step toward simplification. If with this change, the lenient, happy-go-lucky attitude of the American people could be changed to greater seriousness in the enforcement of all law, we should have made great strides toward an efficient and expeditious enforcement of the public law.

THE END.

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